83-458

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a market order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture (7 U.S.C. 608c(15)(A)). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court (7 U.S.C. 608c(15)(B)). The questions presented are:

1. Whether this statutory scheme for reviewing market orders precludes judicial review of milk market orders at the behest of ultimate consumers of milk products, who are neither regulated handlers nor producers, the direct beneficiaries of the market orders.

2. Whether ultimate consumers of milk products, who assert interests that are either antithetical to the interests Congress sought to promote in the Act or are not implicated by the market orders challenged in this litigation, lack standing to maintain this lawsuit.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption, Deborah Harrell, Ralph Desmarais, Zy Weinberg, and Joseph Oberweis were plaintiffs in the district court and appellants in the court of appeals, and are respondents here. The National Milk Producers Federation, the Associated Milk Producers, Inc., and the Central Milk Producers Cooperative were granted leave to intervene as defendants in the district court, appeared as appellees in the court of appeals, and, pursuant to Rule 19.6 of the Rules of this Court, are respondents in this Court.

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The Solicitor General, on behalf of the Secretary of Agriculture and the United States Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-44a) is reported at 698 F.2d 1239. The opinion of the district court (App. G, *infra*, 53a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983 (App. E, *infra*, 50a).[1] On July 8, 1983, the Chief

[1] The government's petition for rehearing was denied on March 28, 1983 (App. C, *infra*, 47a). The time for filing a

Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth in Appendix H, *infra*, 69a-95a.

STATEMENT

This case concerns the jurisdiction of a federal district court to entertain a challenge to market orders by unregulated ultimate consumers of milk products who are nowhere included in the statutory scheme for administrative and judicial review of market orders and whose asserted interests are antithetical to the interests Congress sought to promote in the statute.

1. a. Section 8c of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. 608c, authorizes the regulation of numerous agricultural commodities and products, including milk. One of Congress' primary purposes in enacting the AMAA was to end destructive price competition in the dairy industry, the structure of which "is so eccentric that economic controls have been found at once necessary and difficult." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 529 (1949).

The ruinous competition among dairy farmers that concerned Congress centered on fluid milk sales because such sales bring higher prices than do sales of milk for "surplus" use, *i.e.*, use in manufacturing

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petition for a writ of certiorari did not begin to run, however, until the court of appeals denied the petition for rehearing filed by the intervenor-appellees. See Rule 20.4 of the Rules of this Court.

butter, cheese, and other milk products. See *Zuber* v. *Allen*, 396 U.S. 168, 172-176 (1969); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 548-550 (1939); *Nebbia* v. *New York*, 291 U.S. 502, 515-518, 530 (1934).[2] One of the principal tools Congress used to correct this problem and to guard against its recurrence was the market order system authorized by 7 U.S.C. 608c. The "essential purpose of [the market orders regulating commodities is] to raise producer prices." S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935). With respect to milk, such orders provide a method by which the benefits of the desirable fluid milk market and the burdens of the surplus milk market are fairly and proportionally shared among all dairy farmers supplying a given market. See *Nebbia* v. *New York*, *supra*, 291 U.S. at 517-518.

Under the authority of the Act, the Secretary has issued 46 milk market orders, each encompassing a different region of the country (see 7 C.F.R. Parts 1001-1139). The orders establish minimum prices that handlers (those who process the raw milk) must pay to producers (dairy farmers). The prices are determined according to a classification system based on the end use to which the raw milk is put by the handlers. See 44 Fed. Reg. 65990 (1979). If the milk is used in hard manufactured products such as cheese,

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[2] Fluid milk must be consumed relatively quickly after it is produced because it is a naturally fertile field for the growth of bacteria. If it cannot be marketed quickly in fluid form, it must be manufactured into cheese, butter, powder, or other milk products that can be stored for longer periods. Milk that cannot be disposed of in fluid form is referred to in the trade as "surplus," and it commands a lower price than fluid milk because it is manufactured into products that compete directly with similar products from across the nation. See App. A, *infra*, 3a.

butter, dry whole milk, or nonfat dry milk, a handler pays at least the Class II minimum price (*ibid.*).[3] For milk used as fluid milk, a handler pays the higher, Class I minimum price (*ibid.*). Under all but three of the market orders, all handlers' payments for regulated milk used in the different classes are pooled, and farmers are paid from the pool on the basis of the weighted average price received for milk in all uses—the "blend price" (*ibid.*). Thus, handlers pay according to use, as required by 7 U.S.C. 608c(5)(A). Farmers, on the other hand, receive a uniform, blend price, as required by 7 U.S.C. 608c(5)(B), and no longer have to engage in counterproductive competition for fluid milk sales.

b. Reconstituted or recombined milk is manufactured by mixing milk powder with water. See 44 Fed. Reg. 65990 (1979). Consumers can purchase milk powder and reconstitute it themselves by mixing it with water. Such milk powder is not the subject of this litigation. Instead, respondents brought this action to challenge the market order regulation of milk that a *handler* reconstitutes into fluid milk.

Since 1964, the Secretary has treated handler reconstituted fluid milk as a Class I product in order to ensure the integrity of the end use classification system. See 29 Fed. Reg. 9010 (1964). The Secretary reconsidered the issue in 1968 and again determined that regulation of reconstituted milk was required to assure uniform and adequate minimum prices and to prevent the recurrence of destructive competition among farmers. The Secretary explained (34 Fed. Reg. 16883 (1969)):

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[3] Some market orders contain a three-class pricing system. For all practical purposes, however, this case concerns only the difference between Class I and Class II prices (see App. A, *infra*, 3a n.7).

Primarily the problem relates to the conversion by a handler of a product, such as nonfat dry milk, normally priced as a surplus use into another product for Class I use. In addition, the possible entrance into the market of reconstituted products from unregulated sources enlarges the problem.

The potential of these conditions for disruptive influence on the market for producer milk is extremely serious because disposition of a product for a Class I use but pricing it in a surplus price class undermines the classified pricing system.

* * * * *

The objectives of classified pricing are uniformity of pricing according to form or use and providing an adequate return to producers for the fluid market. Therefore, the widespread disposition of filled milk made from reconstituted skim milk, if the skim milk were not subject to some "equalizing" payment, could lead to total defeat of such objectives. Certainly, the classification and pricing plan should protect the Class I market from the potential effects of competition with products produced from the market's own surplus or similar products produced elsewhere at a manufacturing price when used in filled milk.

* * * * *

In this case payment to the producer-settlement fund at the difference between the Class I price and surplus price is necessary not only to assure competitive equity among handlers but also to insure the integrity of the classified pricing system as a means of assuring reasonable prices to producers.

Accordingly, each of the regional milk market orders defines reconstituted milk that is used for drinking purposes as "fluid milk," thereby including it in Class I (see 44 Fed. Reg. 65990 (1979)). Under this

system, handlers pay at least the minimum Class I price for all milk products used for fluid consumption. Thus, if a handler dries the raw milk received from a producer, then reconstitutes it and uses it as fluid milk, it is priced as a Class I product. If, however, the handler dries producer milk into powder and stores or sells it as powder, the powder is priced to him as a Class II or Class III product.[4]

2. The Secretary issues a market order only after rulemaking proceedings that include public notice and the opportunity for a hearing (7 U.S.C. 608c(3) and (4)). The evidence introduced at the hearing must show "that the issuance of such [proposed] order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity" (7 U.S.C. 608c(4)). But before a milk market order can become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and two-thirds of the dairy producers in the affected region (7 U.S.C. 608c(8)). If the handlers withhold consent, the Secretary may nevertheless impose the order if he determines that it is "the only practical means of advancing the interests of the producers" and two-thirds of the producers consent (7 U.S.C. 608c(9)(B)). An order may be terminated by the Secretary (7 U.S.C. 608c(16)(A)) or by a majority of the producers in an order area (7 U.S.C. 608c(16)(B)).

Because this statutory scheme gives handlers considerably less control than producers over the adop-

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[4] In part, this pricing system is accomplished through a series of assumptions and adjustments known as "down allocations" and "compensatory payments" (see 45 Fed. Reg. 75956-75957 (1980); App. A, *infra*, 4a-5a). The operational details of the pricing system are not relevant to the issues raised at this threshold stage of the litigation.

tion and retention of market orders, the Act expressly provides for administrative and judicial review of market orders at the behest of handlers. Specifically, 7 U.S.C. 608c(15)(A) provides that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek judicial review of "such ruling" in the appropriate district court (7 U.S.C. 608c(15)(B)). The Act contains no other provisions for the review of market orders.

3. In December 1980, respondents[5] commenced this action in the United States District Court for the District of Columbia, seeking a declaration that all of the milk market orders, insofar as they apply to reconstituted milk products and milk powder used to make reconstituted milk products, are invalid, and an injunction prohibiting petitioners from "implementing" the regulations (which have been in effect since 964) (C.A. App. 29). The plaintiffs, who included three individual consumers of fluid dairy products, sought to have the Secretary amend the milk market orders so that reconstituted milk would no longer be deemed a Class I product, regardless of its end use by a handler.[6] In their complaint, the individual con-

[5] As used in this petition, "respondents" refers to the plaintiffs in the district court and does not include the intervenor-defendants who are respondents in this Court by virtue of Rule 19.6 of the Rules of this Court.

[6] Prior to filing suit, respondents had petitioned the Secretary to hold a rulemaking hearing on the same proposal (see 44 Fed. Reg. 65990 (1979)). The Secretary published a Notice of Request for Hearing and asked for comments (*ibid.*).

sumers alleged that "[t]he existing regulations have denied them the opportunity to purchase a lower price reconstituted milk product in lieu of raw fluid milk" (C.A. App. 21).[7] Joseph Oberweis, a handler regulated by one of the market orders, and the Community Nutrition Institute, a self-described "nonprofit charitable organization" (*id.* at 20-21), joined the individual consumers as plaintiffs.

Ruling on cross-motions for summary judgment, the district court dismissed the complaint for lack of jurisdiction (App. G, *infra*, 53a-67a). Citing *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), cert. denied, 409 U.S. 933 (1972), and *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979), the district court concluded that Congress intended to

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Subsequently, the Secretary published a preliminary impact analysis of respondents' proposal and invited comments (45 Fed. Reg. 75956 (1980)). Respondents filed this action shortly thereafter. Later, on April 7, 1981, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act and could harm the dairy industry (C.A. App. 170). As a result of this action by the Secretary, the court of appeals held that that portion of respondents' complaint challenging the Secretary's "inaction" on their rulemaking request (*id.* at 20) had become moot (App. A, *infra*, 32a n.93). In its present posture, the case is limited to respondents' right to challenge the market orders on their merits.

[7] The complaint described the individual consumers as follows (C.A. App. 21):

> Plaintiffs Harrell, Desmarais and Weinberg are consumers of fluid dairy products. Due to inflation, they have become extremely cost-conscious and routinely seek to decrease food expenditures without sacrificing taste or the nutritional value of their diet. The existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk product in lieu of raw fluid milk. If such lower priced milk were available they would purchase it.

preclude ultimate consumers from seeking judicial review of milk market orders (App. G, *infra*, 65a-66a). The district court also held that the consumers lacked standing because, even if the regulations were changed, too many other variables could affect the prices paid by consumers for reconstituted milk; thus, the court concluded that "any benefit to the [consumer] plaintiffs from the proposed changes in the regulations is [too] hypothetical and speculative" to confer standing (*id.* at 61a). In addition, the district court concluded that the interest asserted by the consumers—lower prices for one type of fluid milk—was outside the zone of interests protected by the AMAA. The relevant provisions of the statute, the court noted, were intended to protect consumers only against rapid or excessive price increases and against prices above the parity level (*id.* at 62a-64a). Because those interests were not implicated in this case, the court held that the statute did not confer standing on these consumers (*id.* at 64a). Finally, the district court dismissed the milk handler because he had failed to exhaust his administrative remedies under 7 U.S.C. 608c(15) (App. G, *infra*, 66a-67a).

4. A divided panel of the court of appeals affirmed in part and reversed in part, and remanded the case for a decision on the merits. The court of appeals agreed with the district court's dismissal of the milk handler and the nutrition organization (App. A, *infra*, 27a-33a). The majority held, however, that the district court had erred in dismissing the complaint of the individual consumers (*id.* at 12a-26a).

With respect to preclusion of review, the court of appeals declined to follow *Rasmussen* v. *Hardin*, *supra*, concluding that the Ninth Circuit's analysis of the statutory structure of the AMAA and its purposes did not reveal "the type of clear and convincing evidence of congressional intent needed to overcome

the presumption in favor of judicial review" (App. A, *infra*, 27a n.75). As for standing, the court concluded that the individual consumers had satisfactorily alleged injury in fact by claiming that the regulations deprive them of a lower priced alternative to whole milk and that the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply (*id.* at 14a). The majority repeatedly questioned whether the consumers' allegations of injury and redressability were capable of proof, but it concluded that they were sufficient to require a trial on the merits (*id.* at 14a, 16a, 17a-19a).

The court of appeals also held that the concerns of the individual consumers in this case were within the zone of interests protected by the AMAA. The majority rejected the district court's reliance on the AMAA's legislative history to determine the zone of interests arguably protected by the statute, concluding that plaintiffs are "only required to assert an interest 'which is *arguable from the face of the statute*'" (App. A, *infra*, 22a (emphasis in original), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978)), and that the individual consumers "have clearly done this much" (App. A, *infra*, 22a). Thus, the majority not only chastised the district court for "examining the legislative history in great detail" (*id.* at 23a), but in fact declined to examine it at all. Finally, while noting that the individual consumers' asserted injury "is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk" (*id.* at 25a), the majority ruled that the consumers' claim was not barred as a generalized grievance (*id.* at 25a-26a).

Judge Scalia dissented in part. Judge Scalia concluded that the individual consumers lacked standing, and thus he would have affirmed the judgment of the

district court in its entirety (App. A, *infra*, 35a-44a). In his view, the consumers' interests fall outside the zone of interests arguably protected by the AMAA. Judge Scalia placed considerable weight on the fact that the individual consumers are "indirect general beneficiaries" of the AMAA (*id.* at 38a) and observed that "where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated 'private attorneys general' is weak indeed" (*ibid.*). As applied to this case, Judge Scalia thus reasoned that (*id.* at 38a-39a):

> The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. * * * On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. * * * In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

The government and the intervenor-appellees petitioned for rehearing en banc. The petitions were denied over the dissenting votes of Judges MacKinnon, Bork, and Scalia (Apps. D and F, *infra*, 48a-49a, 51a-52a).

REASONS FOR GRANTING THE PETITION

The decision below, in direct conflict with the Ninth Circuit's decision in *Rasmussen* v. *Hardin*, 461

F.2d 595, cert. denied, 409 U.S. 933 (1972), and with the views expressed by the Fifth Circuit in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (1979), is the first in the nearly 50-year history of the market order system to hold that ultimate consumers of regulated agricultural commodities have standing and are proper parties to contest market orders. The case thus presents important questions concerning the orderly administration and review of commodity market orders issued by the Secretary of Agriculture under the AMAA. The significance of these questions is heightened by the vast scope of the regulatory program at issue, the complexity of which this Court has often recognized. See, *e.g.*, *Zuber* v. *Allen*, 396 U.S. 168, 172 (1969); *United States* v. *Ruzicka*, 329 U.S. 287, 292 (1946). The Department of Agriculture advises us that the value of milk handled under the various regional market orders exceeds an average of $1 billion each month. Moreover, it would seem that the court of appeals' ruling would logically extend to market orders covering other agricultural products, and approximately $6 billion worth of fruits, vegetables and specialty crops were handled under those market orders in 1982. The regulation of these commodities is so complex that some orders require adjustments to be made as often as once a week during the marketing season.

The court of appeals' decision appears to sanction challenges to all of these orders by every milk, fruit and vegetable consumer in the country. A primary purpose of the statutory program is to promote market stability, but judicial intervention at the behest of consumers who are strangers to the producer-handler relationship could result in constant uncertainty about the validity of the orders. Such uncertainty is likely to "engender those subtle forces of

doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, *supra*, 329 U.S. at 293.

If the decision below is allowed to stand, highly technical and complex market orders will be subject to direct attack in the courts without first being reviewed in the administrative proceedings contemplated by Congress. Consumers acting as "stalking horses" for handlers, or even handlers suing in their capacity as alleged consumers, will be able to by-pass completely the Act's exclusive procedures for administrative and judicial review. Thus, in granting ultimate consumers standing to launch direct attacks in the courts against agricultural market orders, the court of appeals improperly ignored this Court's teachings that the intent of Congress to preclude review, if fairly perceived from the overall statutory scheme adopted by Congress for regulating the particular industry in issue, must be respected.

Closely related to the question of preclusion of review is the court of appeals' erroneous conclusion that the individual consumers adequately demonstrated their standing to maintain this action. Of course, if the Court agrees with our submission that Congress intended to preclude *all* consumers from seeking judicial review of market orders, it need not reach the issue of respondents' standing. But, at minimum, examination of the structure and legislative history of the AMAA clearly indicates that Congress did not intend to protect the interests asserted by the individual consumers in *this* litigation; on the contrary, their interest in lower prices for reconstituted fluid milk is inconsistent with Congress' primary purpose in enacting the statute, while their interest in ensuring stable supplies of fluid milk products simply is not implicated by the regulations at issue in this case. Accord-

ingly, review by this Court is warranted to resolve the conflict among the circuits on the question of preclusion of review and to correct the court of appeals' manifest error with respect to consumer standing.

1. a. The decision below squarely conflicts with the Ninth Circuit's decision in *Rasmussen* v. *Hardin*. In that case, the Ninth Circuit held that consumers of a filled milk product were barred from seeking review of the milk market order provisions that effectively raised the price of the product in the same manner that the market order provisions at issue in this case effectively raise the price of manufacturer reconstituted fluid milk. The court held that "clear and convincing evidence" of an intent to preclude review by consumers could be "inferred from [the statutory] purpose." *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599, quoting *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970). The court went on to explain (461 F.2d at 599) that:

> [It cannot] be said that Congress overlooked consumers, and that therefore it did not intend to exclude them from obtaining administrative and judicial review of the Secretary's orders. The Act contains some pious platitudes about the interests of consumers. * * * The primary purpose of the Act, however, is to protect the purchasing power of the farmers and the value of agricultural assets. * * * The whole scheme of the Act is to raise the prices of agricultural products to, and keep them at, levels fixed by the Secretary, and to establish "orderly" marketing of them. Bluntly stated, that means, in part, marketing freed to a very large extent from price competition. It is arguable that the immediate, and possibly the long-run, interests of consumers are contrary to these goals. * * * [I]t is very clear that the whole structure of the Act con-

> templates a cooperative venture betweer the Secretary, the producers, and handlers. Nowhere in the Act can we find an express provision for participation by consumers in any proceeding. We are convinced that this is no accident.

The Fifth Circuit has suggested that it would reach the same result if confronted with a case squarely presenting the issue. In *Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1067 n.3, the court upheld *producers'* standing to challenge a milk market order but distinguished *consumer* interests:

> We find the generalized interests of consumers in a marketing order totally different from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers.

In *Rasmussen*, the Ninth Circuit also noted that consumer suits would be particularly anomalous because the statute contains no requirement for consumers to exhaust administrative remedies, whereas handlers, who are given an express right of judicial review, must first exhaust administrative remedies. Consumer suits would thus mean that handlers could evade the exhaustion requirement by latching on to consumer "front-men." See *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 600. This case vividly demonstrates the potential for such abuse of the legislative scheme. Respondent Oberweis was dismissed for failure to exhaust his administrative remedies as a handler (App. A, *infra*, 31a-33a; App. G, *infra*, 66a-67a). Yet as a result of the majority's decision to allow the individual consumers to maintain this action, Oberweis will still have his claims adjudicated without first invoking the administrative process. Indeed, it would not

be at all surprising if Oberweis were a "cost-conscious consumer," as well as a milk handler, and the decision below would appear to allow for amendment of the complaint to add Oberweis in his new-found capacity as a consumer plaintiff.

This Court has expressly disapproved of analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See, *e.g.*, *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-376 (1979) ("If a violation of Title VII could be asserted through § 1985(3), * * * the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII"); *Brown* v. *General Services Administration*, 425 U.S. 820, 832-833 (1976) ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. * * * Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.").

Similarly, authorizing consumer litigants to challenge market orders issued under the AMAA offers the potential for considerable mischief. Congress had sound reasons for concluding that attacks on market orders should be considered by the Secretary in the first instance. The questions raised in such attacks are often complex, and their resolution requires an intimate knowledge of the economic and technical factors underlying the marketing of the various agricultural products subject to regulation—*e.g.*, milk, nuts, fruits, vegetables, and hops (7 U.S.C. 608c(2)). It is thus

desirable that, before judicial intervention is sought, these questions be presented to the Secretary, who possesses the requisite expertise to illuminate and resolve them. See, *e.g.*, *Blair* v. *Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966) ("A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing.").

This Court recognized the importance of these considerations in *United States* v. *Ruzicka*, *supra*. In rejecting an effort by a handler to attack for the first time the validity of an order of the Secretary of Agriculture as a defense to a judicial enforcement proceeding brought by the Secretary, the Court stressed the purposes of the statutory review provisions (329 U.S. at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his rulings, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.[8]

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[8] Respondents' petition for a rulemaking hearing (see pages 7-8 note 6, *supra*) is no substitute for the administrative procedures mandated by the statute and available only to handlers. As the court of appeals noted (App. A, *infra*, 32a-33a; emphasis in original), the complaint in this case "challenge[s] the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; [the] complaint did *not* attack his subsequent refusal to correct that alleged wrong." Thus, the issues raised in the lawsuit were *not* decided by the Secre-

Ruzicka articulated another important reason for requiring handlers to exhaust the statutorily-prescribed administrative remedies when it stressed the disruptive potential of premature litigation (329 U.S. at 293):

> Failure by handlers to meet their obligations promptly would threaten the whole [regulatory] scheme. * * * To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance.

Consumer suits would effectively nullify Congress' intent, recognized by this Court in *Ruzicka* (329 U.S. at 293-294 & n.3), to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. No. 1011, *supra*, at 14. Consumer litigants could seek injunctions against the operation of market orders that Congress intended to remain in effect pending the completion of full administrative and judicial proceedings brought by handlers. Such a result cannot be squared with *Ruzicka*, or with the limitations on judicial review at the behest of handlers contained in 7 U.S.C. 608c(15)(B).

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tary's denial of the petition for a rulemaking hearing. Moreover, as explained by Judge Scalia (*id.* at 41a-44a), the administrative proceeding required by 7 U.S.C. 608c(15)(A) as a prerequisite to judicial review is an entirely different type of proceeding from the informal rulemaking hearing that respondents sought.

b. The court of appeals clearly erred in its disregard for the statutory scheme and in its insistence (App. A, *infra*, 27a n.75) on express statutory language foreclosing actions by ultimate consumers. This Court has already held that preclusion of review may be implied as well as expressed. "A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose." *Barlow* v. *Collins*, *supra*, 397 U.S. at 166-167; accord, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). Moreover, the stringent standards normally required to demonstrate congressional intent to preclude review are less appropriate when the issue is not whether judicial review is entirely foreclosed but instead whether review at the behest of the particular plaintiff is precluded. See, *e.g.*, *United States* v. *Ruzicka*, *supra*, 329 U.S. at 293-294; see also *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23; *Morris* v. *Gressette*, *supra*, 432 U.S. at 505-507 & n.21; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977); *Barlow* v. *Collins*, *supra*, 397 U.S. at 175 n.9 (Brennan, J., concurring and dissenting); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 300 (1943).

It is thus extremely significant in this case that the Act does grant handlers an express right to judicial review. Handlers serve as spokespersons for interests shared with the general public,[9] and granting an exclusive right of review to handlers strikes the

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[9] That consumer interests are truly deprivative of handler interests—consumers complain that they pay more because handlers pay more—is shown by the fact that handlers and consumers asserted identical claims both in the instant case and in *Rasmussen* v. *Hardin*, *supra*. See App. A, *infra*, 39a-40a (Scalia, J., dissenting).

necessary balance between the need for stability in the functioning of the progam and the importance of providing a forum for the redress of grievances. See page 18, *supra*. Adding consumers to the category of persons entitled to sue, when, as the Ninth Circuit found, Congress did not overlook consumers but instead necessarily intended to exclude them (*Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599), quite clearly upsets this balance. Under these circumstances, the majority erred in requiring more explicit evidence of congressional intent to preclude review.

c. Although the court of appeals relied (App. A, *infra*, 27a n.75) on this Court's decision in *Stark* v. *Wickard*, 321 U.S. 288 (1944), that case is plainly distinguishable. There milk producers challenged certain deductions that were made from the so-called "producers settlement fund" established in connection with a milk market order. In granting standing to the producers, even though Congress failed to give them an administrative remedy or the right to judicial review, the Court pointed out that they had a proprietary interest in the fund, and that it "is because every dollar of reduction comes from the producer that he may challenge the use of the fund" (321 U.S. at 308). The Court also noted that the statute gives producers "definite personal rights," rights that are "not possessed by the people generally" (*id.* at 304, 309). Clearly, the proprietary interest asserted in *Stark* could not be adequately represented by some other party. By contrast, as already noted (see page 19 note 9, *supra*), and as Judge Scalia pointed out in dissent (App. A, *infra*, 38a-40a), the consumer interests in this case are merely derivative of, and protected by, the more specific interests of handlers.[10]

[10] It is also worth noting that the disruptive potential arising out of a producer suit such as that authorized in *Stark*

2. Assuming arguendo that Congress did not preclude *all* consumer suits under the AMAA, nevertheless the court of appeals erred in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. The various elements of the standing doctrine were thoroughly set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). There the Court held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge, supra*, 454 U.S. at 472 (footnote omitted). In addition, the Court has adhered to a number of prudential considerations bearing on the question of standing. Thus, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475, quoting *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975). And "the Court has required that the

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is far less than the disruption likely to be caused by consumer suits of the type sanctioned by the decision below. Milk market orders only become and remain effective with the agreement of a majority of the producers (see page 6, *supra*), and thus producer suits challenging such orders will be relatively infrequent. Consumers, on the other hand, could conceivably assert an "interest" in challenging every market order because, by legislative design, they would have played no formal role in devising the orders.

plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge, supra*, 454 U.S. at 475, quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The consumer respondents failed to satisfy a number of these requirements.

Respondents alleged two injuries in their complaint. First, they claimed that the market orders deprive them of a nutritious, low-cost substitute for regular fluid milk. Second, they claimed that, by making reconstituted fluid milk uneconomical for handlers to produce, the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk.[11] Respondents' first asserted injury lies outside the zone of interests arguably protected by the AMAA, while the second asserted injury fails to satisfy the constitutional requirement of injury in fact. Moreover, the complaint as a whole fails to satisfy the Article III requirement of redressability and the pru-

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[11] Specifically, respondents described their alleged injuries as follows (C.A. App. 25-26):

> 28. The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs Weinberg, Harrel, and Desmarais and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk.
>
> * * * * *
>
> 31. The existing Orders deprive producers and consumers of a stabilizing market influence. A reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply. Tight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible.

dential prohibition against the litigation of generalized grievances.

a. Respondents' allegation that the market order provisions at issue deprive them of a low-cost substitute for regular fluid milk fails to satisfy the zone of interests requirement. The primary purpose of the AMAA is to protect dairy farmers;[12] the express purpose of the market order provision (7 U.S.C. 608c) is "to *raise* producer prices." S. Rep. No. 1011, *supra*, at 3 (emphasis added). Thus, as the Ninth Circuit noted in *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599, consumers' interests in lower prices not only are not within the scope of Congress' concern, but are actually contrary to the legislative design.

The court below totally disregarded Congress' purpose in enacting the AMAA when it held that consumers' interests in lower prices for reconstituted fluid milk fall within the Act's zone of interests. The court of appeals' error was twofold—first, it relied on isolated statutory references to consumers that, when analyzed, do not support the court's conclusion, and, second, it eschewed any resort to the legislative history to elucidate the statute's meaning.

The court of appeals' conclusion on the zone of interests issue rested on policy sections of the AMAA that merely reference consumers. For example, 7 U.S.C. 602(2) provides that it is the policy of Congress:

[12] Confirmation of Congress' solicitude for farmers is apparent from the Act's requirement that at least two-thirds of the dairy farmers in an affected region must approve a proposed market order before it may take effect (7 U.S.C. 608c(8)). This requirement operates even in the face of opposition from affected handlers if "such order is the only practical means of advancing the interests of the producers" (7 U.S.C. 608c(9)(B)). Moreover, if producers become dissatisfied with an order they, unlike handlers, may require the Secretary to terminate it (7 U.S.C. 608c(16)(B)).

> [t]o protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

It is difficult to understand how this section's reference to consumers supports the result reached by the court of appeals. In the quoted section, Congress acted to protect the interest of consumers only to the extent that that interest was consistent with the pricing policy for farmers established in 7 U.S.C. 602(1). That section's declared policy is to establish parity prices for farmers. As the court of appeals itself noted, 7 U.S.C. 602(2) "expresses Congress' intent to protect consumers against *unwarrantably rapid or excessive* price increases by limiting the Secretary's authority to fix prices at parity and no higher" (App. A, *infra*, 20a; emphasis added; footnote omitted). Clearly, that legislative intent to ensure price *stability* has nothing to do with consumers' asserted interest in *lowering* prices for reconstituted fluid milk.[13]

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[13] The Department of Agriculture advises us that throughout the entire history of the AMAA, the blend prices paid to producers under the market orders have rarely, if ever, reached parity. For at least the last several years, the blend prices paid under all orders have been below parity. Thus, even the limited protection that Congress may have intended for consumers is not implicated by the realities of the regulatory program.

The court of appeals also relied on 7 U.S.C. 602 (4), which expresses a policy of protecting producers and consumers against "unreasonable fluctuations in supplies and prices." See App. A, *infra*, 22a-23a. Again, this section does not support the interest in *lower* prices asserted by the consumer respondents. Moreover, the consumers have never alleged that the challenged market order provisions subject them to unreasonable *fluctuations* in prices. Equally important, as pointed out by the district court, Section 602(4) was enacted in 1954 as an amendment to the AMAA, in response to totally different problems from those addressed by Congress in 1937 (App. G, *infra*, 62a-63a; emphasis added):

> The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. * * *
>
> Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a significant part of the 1954 Act. *The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. See* House Report, *supra*, at 3404.

Therefore, the statute's mere mention of consumers is insufficient to bring the consumer respondents in this case within the zone of interests to be protected by the AMAA. Careful analysis of the statutory purposes, erroneously eschewed by the court of appeals, reveals that lower prices for consumer products was simply not an interest that Congress acted to protect.

Finally, the court of appeals clearly erred in disregarding the statute's legislative history (App. A, *infra*, 21a-23a). As this Court has recognized, " 'there certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976), quoting *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940). Here, "superficial examination" of the statute does indeed show that "consumers" are mentioned in the Act; but closer analysis of the structure of the statute and examination of the legislative history demonstrate that the interests asserted by the consumers in *this* litigation were never within the contemplation of Congress. The court of appeals' contrary conclusion, based only on the fact that the statutory text mentions "consumers," should be corrected.

b. The court of appeals also erred in concluding that the consumer respondents satisfactorily established their standing to maintain this suit through their allegation that the market order provisions at issue "deprive producers and consumers of a stabilizing market influence" (C.A. App. 26). Ensuring stable market conditions *is* an express purpose of the statute (see 7 U.S.C. 602(4)), and thus respondents' asserted injury is arguably within the Act's zone of interests.[14] The problem here, however,

[14] The legislative history indicates, however, that, as with prices, Congress' intention to promote market stability was meant to protect *farmers* rather than consumers. See H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935) (emphasis added) ("In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply *with their attendant disturbing effect upon returns to producers*, and to encourage a uniform volume of production throughout the

is that respondents essentially did no more than parrot the language of the statute. Even then, their allegation of injury was entirely speculative and hypothetical; they asserted that "[a] reconstituted fluid product *could* quickly expand the fluid milk supply * * *" (C.A. App. 26; emphasis added). Plainly, this is insufficient to demonstrate the constitutionally-required injury in fact. Respondents did not allege that *they* (or, for that matter, any other consumers) have ever been or are likely to be subjected to seasonal shortages in milk supply. This is a fatal defect. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 498-499, 504.

Moreover, any allegation that the consumer respondents have in fact suffered or are likely to suffer from seasonal shortages would be untenable. There are indeed seasonal fluctuations in the production of milk, but a number of regulatory mechanisms operate to prevent those fluctuations from affecting ultimate consumers.[16] Under these circumstances, respondents

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year, an adjustment in payments to producers" may be made.). See also *Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1064-1065 (emphasis added) ("The blend price mechanism established by a milk marketing order acts as a stabilizing influence that insulates *farmers* from the buffeting of prices that would otherwise accompany differences in consumer demand.").

[16] Many market orders establish a "base" system for allocating payments from handlers to producers. See 7 U.S.C. 608c(5)(B); H.R. Rep. No. 1241, 74th Cong., 1st Sess. 9-10 (1935). Adjustments to the base system may authorize higher payments for milk produced during seasonal low periods and thus provide incentives to counteract fluctuating production levels. *Id.* at 10. Second, the price paid to rural producers may include a premium to provide them with an incentive to ship their milk to city markets whenever necessary. *Id.* at 9-10. Third, the price support system, an entirely separate system regulating milk production (see 7 U.S.C. 1421-1449),

were required to come forward with facts supporting their claimed injury. They utterly failed to do so with respect to their market stabilization claim, and that claim must therefore be disregarded. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 501-502.

c. While recognizing that the interests asserted by the consumer respondents in this case are widely shared (App. A, *infra*, 25a), the court of appeals concluded that dismissal of the suit on "generalized grievance" grounds would mean that consumer suits would never be justiciable (*ibid.*). In the context of this case, the court was clearly wrong. As stressed by Judge Scalia in dissent (*id.* at 38a-40a), consumer interests in milk market orders are entirely derivative of handlers' interests and can be fully protected by handlers' suits (brought after proper exhaustion of administrative remedies). Moreover, Congress, when it chooses, can and does overcome prudential limitations on standing such as the generalized grievance doctrine by extending standing to any person adversely affected or aggrieved by the challenged action. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). As we have already demonstrated, however, Congress has not chosen to do so in the AMAA. On the contrary, granting stand-

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keeps the supply of milk high year round because it ensures a market for dairy products even in the months when flush production outstrips consumer demand. In fact, since the fall of 1979, there has been a dramatic increase in milk production without a concomitant increase in demand. See *South Carolina* v. *Block*, Nos. 83-1426 and 83-1511 (4th Cir. Sept. 9, 1983), slip op. 6; 48 Fed. Reg. 34943 (1983). During fiscal year 1982, the government purchased nearly $845 million in surplus milk products under the price support system. As a result of these various factors, there is no experience within general knowledge or subject to judicial notice of a shortage of milk at the consumer level.

ing to consumers whose interests are indirect and shared in common with nearly every household in the nation undermines the statutory scheme enacted by Congress and threatens to disrupt a massive program that has stability as a primary goal. See, *e.g.*, 7 U.S.C. 601. Such a dramatic change in a regulatory program of nearly 50 years' duration is "most appropriately addressed in the representative branches." *Valley Forge*, *supra*, 454 U.S. at 475.

d. Finally, respondents failed to show that the interests they seek to advance are redressable by a favorable judicial decision in this action. Congress has recognized that retail prices paid by consumers are largely independent of the wholesale prices paid to farmers. H.R. Rep. No. 1927, 83d Cong., 2d Sess. 7, 9 (1954). Thus, it is entirely speculative and beyond the control of the Secretary whether changes in the market orders would bring about the lower retail prices that the consumer respondents seek. As the district court explained (App. G, *infra*, 61a):

> There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative.

The court of appeals disagreed with these observations based solely on the Department of Agriculture's preliminary impact analysis, 45 Fed. Reg. 75956

(1980), which the court read as showing that the immediate (*i.e.*, within three years) impact of adopting respondents' proposal would be to save consumers nationwide $186 million annually (App. A, *infra*, 17a). But the court misunderstood the impact analysis. In fact, the analysis offers no evidence regarding the likely behavior of the many nonregulated parties intervening between producers and ultimate consumers, whose actions necessarily determine the redressability of respondents' grievance. Rather, for purposes of studying respondents' proposal, the impact analysis assumed that all factors would operate to consumers' benefit because it was impossible to measure those factors (see 45 Fed. Reg. 75960, 75963 (1980)). Thus, the assumption that a change in the market orders would benefit consumers remains entirely speculative and cannot satisfy the Article III requirement of redressability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL, APPELLANTS,

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

Argued 4 Oct. 1982

Decided 21 Jan. 1983

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 80-03077)

Before TAMM, WILKEY and SCALIA, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

Opinion concurring in part and dissenting in part filed by Circuit Judge SCALIA.

WILKEY, Circuit Judge:

Appellants, three individual consumers of milk, a non-profit consumer organization and a handler of milk products, have joined forces to challenge the manner in which reconstituted milk is regulated under forty-seven milk market orders adopted pursuant to the Agricultural Marketing Agreement Act (AMAA).[1] The district court dismissed their com-

[1] 7 U.S.C. §§ 601-624 (1976 & Supp. V 1981).

plaint, holding that the individual consumers and the organization lacked standing and that the handler failed to exhaust his administrative remedies. We reverse the district court's decision with respect to the individual consumers and remand the case for a decision on the merits.

I. BACKGROUND

A. *The Regulatory Scheme*

The Secretary of Agriculture (the Secretary) has regulated the milk industry through the use of milk market orders since 1937.[2] These orders, issued pursuant to section 608c of the AMAA,[3] regulate the price milk producers[4] receive for their dairy products. The orders are effective on a regional basis and cover most, but not all, of the United States.[5] Under the orders, dairy products are divided into separate classes, based on the use to which the raw milk is ultimately put. Raw milk which is processed and bottled for fluid consumption is Class I milk.[6] Raw milk which is used to produce manufactured milk

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[2] The conditions leading to the enactment of the AMAA have been chronicled in previous judicial decisions. *See, e.g., Zuber* v. *Allen*, 396 U.S. 168, 172-76, 90 S.Ct. 314, 317-19, 24 L.Ed.2d 345 (1969); *Shepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 13-15 (D.C. Cir. 1979).

[3] 7 U.S.C. § 608c (1976 & Supp. V 1981).

[4] A producer is "any person who produces milk in compliance with the inspection requirements of a duly constituted health authority, which milk is received at a pool plant or diverted . . . from a pool plant to a non-pool plant." 7 C.F.R. § 1012.12 (1982) (Tampa Bay Marketing Order).

[5] 7 C.F.R. §§ 1001-1139 (1982).

[6] *See, e.g., Id.*, § 1012.40(a).

products such as butter, cheese, or dry milk powder is classified as Class II milk.[7]

Class I milk must be consumed rather quickly after it is produced because it is a fertile field for bacteria. It is therefore sold mostly on a regional basis. Class II milk products, on the other hand, can be stored for a longer period of time and therefore compete directly with similar products from across the nation. As a result of this increased competition, Class II milk commands a lower price on the market than fluid milk.

In order to provide dairy farmers with the stability needed to prevent a recurrence of the ruinous competition that devastated the milk industry during the depression,[8] section 608c authorizes the Secretary to issue milk market orders ensuring that producers receive uniform prices for their raw milk irrespective of the use to which it is put.[9] Thus, under current milk market orders "handlers" [10] (who buy the milk from the producers) pay a minimum price for Class I milk and a lower minimum price for Class II milk. The handlers make all payments into a regional pool, and producers are then paid out of the pool on the

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[7] *See, e.g., Id.*, § 1012.40(b). Under many orders milk is divided into three classes. However, for purposes of this case, all milk other than milk used for fluid purposes will be referred to as Class II milk.

[8] *See* note 2 *supra*.

[9] 7 U.S.C. § 608c(5)(B)(ii) (1976).

[10] Handlers are "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product." 7 U.S.C. § 608c(1) (1976).

basis of the average price received for milk in all uses.[11]

Reconstituted milk products are fluid products manufactured by combining water with whole milk powder or nonfat powder.[12] Reconstituted milk was not regulated under the milk market orders for nearly thirty years, but in 1964 the Secretary issued the regulations which are the subject of this dispute.[13] Under these regulations, a handler who purchases milk powder from outside the order area and manufactures it into a reconstituted milk product pays the Class II price and reports the purchase to the order area administrator.[14] The reconstituted milk product is then regulated as though it were fresh milk coming into the area from an unregulated area (an area not subject to a milk market order).[15] It is assumed that the handler will use the reconstituted milk to manufacture Class II products,[16] but if the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk, he is required to make a compensatory payment

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[11] This average price is referred to as the "uniform price" or "blend price." The method for computing this price is set out in 7 C.F.R. § 1012.61 (1982).

[12] Butterfat or nondairy fats such as coconut oil may also be added. The milk is then considered to be "filled" milk.

[13] 28 Fed. Reg. 11,848 (1963); 28 Fed. Reg. 11,956, 12,000 (1963); 29 Fed. Reg. 9,002, 9,110, 9,214 (1964). In 1969 the regulations were expanded to cover "filled" milk. 34 Fed. Reg. 16,548 (1969).

[14] 7 C.F.R. § 1012.30(a) (b) (1982).

[15] *Id.*, § 1012.14(c).

[16] *See, e.g., Id.*, § 1012.44(a) (5) (i).

on the remainder.[17] The compensatory payment is equal to the difference between the Class I and Class II prices and is put into the regional pool for distribution, not to the seller of the milk powder, but to the local producers of fresh milk.[18] It is undisputed that the compensatory payment requirement raises the handler's cost of producing reconstituted fluid milk and it is this aspect of the various milk market orders which appellants challenge.

B. *The Present Litigation*

On 23 August 1977 appellants petitioned the Secretary of Agriculture to eliminate the compensatory payment requirement from the various milk market orders. Nineteen months later, having failed to receive a response to their petition, appellants filed the present action in federal district court, claiming that the regulation requiring compensatory payments exceeded the Secretary's authority under the AMAA and violated the provision of the AMAA prohibiting economic trade barriers on milk and milk products, and that his refusal to act on their petition was arbitrary and capricious. Appellants asked the court to invalidate, and enjoin the enforcement of, the compensatory payment provisions of the various milk market orders.

On 7 April 1981, four months after this suit was filed, the Secretary denied appellant's petition. This decision was made after "a careful and thorough review of the issues," based on public comments and "a

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[17] *Id.*, § 1012.60(e).

[18] *Id.*, § 1012.71(a)(1).

comprehensive preliminary economic impact statement" developed by the agency.[19]

On 29 September 1981 the district court granted appellees'[20] motion to dismiss appellants' complaint. The court first held that the individual consumers and the Community Nutrition Institute (CNI) lacked standing, concluding that they had not shown the requisite injury in fact, that their interests were not within the zone of interests arguably protected by the relevant statute, and that, in any event, Congress intended to preclude consumers from challenging milk market orders in court. The court dismissed the milk handler as well, noting that although he had standing (since the AMAA specifically authorizes judicial review for handlers),[21] he could not be allowed to prosecute the present litigation because he had not complied with the procedural requirements outlined in the statute, thereby failing to exhaust his administrative remedies. This appeal followed.

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[19] Letter from William T. Manley, Deputy Administrator, Marketing Program Operations, to Community Nutrition Institute, 7 April 1981 (USDA Decision Letter) at 1, *reprinted in* Joint Appendix (JA) at 170.

[20] Appellees include the Secretary of Agriculture and the United States Department of Agriculture (the Secretary) and the National Milk Producers Federation, Associated Milk Producers, Inc., and Central Milk Producers Cooperative (Producers).

[21] 7 U.S.C. § 608c(15) (1976).

II. STANDING

A. *General Principles*

In the last decade the Supreme Court has addressed the issue of standing in a variety of contexts.[22] This increased activity has not resulted in a complete clarification of the law;[23] nevertheless, some discernable guidelines have been laid down. It will be helpful to examine these guidelines before applying them to the specific facts of the case at hand.

It is clear that "[t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations."[24] It is now also clear that there are at least three elements a plaintiff must establish in

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[22] *E.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).

[23] *See, e.g.*, Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L.REV. 863 (1977); Davis, *Standing 1976*, 72 NW.L. REV. 69 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV.L.REV. 1281, 1304-05 (1976).

[24] *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. at 471, 102 S.Ct. at 758.

order to satisfy the constitutionally imposed standing requirements.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show [1] that he personally has suffered some actual and threatened injury as a result of the putatively illegal conduct of the defendant," . . . and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision." [25]

Establishing the first element (injury in fact) requires the plaintiff to allege facts demonstrating a definable and discernable injury and an adequate connection between that injury and himself. The requirements of the second and third elements, however, have not always been as clear. Some confusion has arisen because the Supreme Court has used language which seems to indicate that the "fairly traceable causation" requirement and the "redressability" requirement are interchangeable.[26] However, the Court's articulation of the Art. III standing limits in

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[25] *Id.* at 472, 102 S.Ct. at 758 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979) and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)). *See also Consumers Union* v. *Federal Trade Commision*, 691 F.2d 575, 577 n. 9 (D.C.Cir. 1982) (en banc).

[26] For example, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), the Court stated: "The more difficult step in the standing inquiry is establishing that these injuries 'fairly can be traced to the challenged action of the defendant,' . . . *or put otherwise*, that the exercise of the Court's remedial powers would redress the claimed injuries." *Id.* at 74, 98 S.Ct. at 2631 (quoting *Eastern Kentucky*, 426 U.S. at 41, 96 S.Ct. at

Valley Forge recognizes that the two considerations are not necessarily the same.[27] The fairly-traceable causation inquiry is directed toward the connection between the injury and the *defendant's actions*. The redressability inquiry, on the other hand, focuses on the connection between the injury and the *action requested of the court*. The fairly traceable causation requirement is therefore generally based on past or present occurrences (the effect of the defendant's actions), while the redressability requirement is based on future probabilities (the effect of the court's decision). Of course, there is a correlation between the two elements. As the connection between the alleged injury and the defendant's actions becomes more direct, the likelihood that requiring the defendant to change his behavior will redress that injury increases. However, it is important to keep the two inquiries separate, lest the confusion continue.[28]

Therefore, in order to satisfy the Art. III requirements of standing a plaintiff must show three things:

1925) (emphasis added). Similarly, in *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the Court observed that Art. III required a plaintiff to establish that "the asserted injury was the consequence of the defendant's actions [fairly traceable causation], *or* that prospective relief will remove the harm [redressability]." *Id.* at 505, 95 S.Ct. at 2208 (emphasis added).

[27] The Court stated that Art. III requires a plaintiff to show that he has suffered a personal injury and that the injury " 'fairly can be traced to the challenged action, *and* 'is likely to be redressed by a favorable decision.' " *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 38, 41, 96 S.Ct. at 1924, 1925) (emphasis added).

[28] A good example of the difference between the "fairly traceable causation" and the "redressability" requirements can be found in the facts involved in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620,

(1) that he has suffered an actual or threatened injury (an adequate connection between a definable and discernable injury and the plaintiff); (2) that the injury fairly can be traced to the challenged action (an adequate connection between the alleged injury and the defendant's actions); and (3) that the injury is likely to be redressed by a favorable decision (an adequate connection between the alleged injury and the action requested of the court).

Once a plaintiff has met the constitutionally imposed requirements of standing he may still be prevented from prosecuting his suit if prudential considerations [29] dictate that the court stay its hand. Of

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57 L.Ed.2d 595 (1978). In *Duke Power* plaintiffs challenged the Price-Anderson Act, which established a limit on the liability of nuclear power plant operators. The alleged injuries consisted of the adverse environmental and aesthetic consequences of the thermal pollution caused by Duke Power's nuclear power plants. Thus, in order to determine whether the injury could fairly be traced to the federal government, the Court was required to determine whether the existence of the Price-Anderson Act was a cause of the decision to *construct* the nuclear power plant (which was in turn the more immediate cause of the alleged injuries). However, assuming the power plant was substantially completed or already operational, the court would have to determine whether invalidating the Act would cause the plant to *shut down* in order to determine redressability. This is an entirely different consideration because once a company has expended funds to construct a plant, the absence of a liability limitation may not be as important. *See* Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky.L.J. 185, 199-201 (1980).

[29] In a prior opinion this court explained the meaning of the term prudential consideration.

> We believe that the fact that the [non-constitutional] limitations of the standing doctrine . . . are termed "pru-

particular concern to this litigation are the requirement that the plaintiff's complaint be "arguably within the zone of interests to be protected or regulated by the statute . . . in question,"[30] and the reluctance of federal courts to adjudicate " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[31] These prudential considerations also focus on the connection between the alleged injury

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dential limitations" does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and, in the context of cases such as the one now before us, we believe *there is a nondiscretionary duty* to apply the limitations. This duty to apply the standards does not detract from the discretion involved in determing whether the standard has been satisfied.

Tax Analysts & Advocates v. *Blumenthal*, 566 F.2d 130, 137 n. 37 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978) (emphasis added).

[30] *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). *See also Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760; *Gladstone, Realtors*, 441 U.S. at 100 n. 6, 99 S.Ct. at 1608 n. 6; *Eastern Kentucky Welfare Rights*, 426 U.S. at 39 n. 19, 96 S.Ct. at 1924 n. 19.

[31] *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500, 95 S.Ct. at 2205-06). The Supreme Court has observed that another prudential consideration is embodied in the general rule that a " 'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Id.* 454 U.S. at 474, 102 S.Ct. at 759-60 (quoting *Warth* v. *Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205). That consideration is not a concern in this litigation.

and various aspects of the suit. The zone of interests requirement focuses on the connection between the alleged injury and the relevant statute, while the generalized grievance limit seems [32] to require an inquiry into the connection between the alleged injury and the public in general.

Thus, in order to withstand the present motion to dismiss for lack of standing, appellants must allege a definable and discernible injury and then establish the proper connection between that injury and themselves, the Secretary's actions, the requested relief, the relevant statute, and the public in general. We hold that the individual consumers have met this burden, while CNI has not.

B. *Individual Consumer Standing*

Deborah Harrell, Ralph Desmarais, and Zy Weinberg (Consumers) are, according to their allegations, consumers of fluid dairy products who seek to decrease their food expenditures without sacrificing taste or the nutritional value of their diet.[33] The district court dismissed them from the present litigation, holding that they had failed to establish either the constitutional or prudential elements of standing. Applying the analysis outlined above, we must reverse.

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[32] The exact nature of the generalized grievance restriction is far from clear. *See* note 74 *infra*.

[33] Plaintiffs' Complaint for Declaratory Action and Injunctive Relief (Plaintiffs' Complaint) at ¶ 7, *reprinted in* JA at 20.

1. *Art. III Considerations*

a. *Injury in fact* (connection between definable and discernable injury and the plaintiff)

In order to establish the required injury, a plaintiff need not allege facts establishing a substantial injury, "an identifiable trifle will suffice." [34] However, the injury must be definable and discernable and, in order to establish the proper connection to the plaintiff, it must be specific.[35] Consumers have alleged just such an injury.

Consumers allege that the existing reconstituted milk regulations injure them in two ways. First, they claim they are precluded from purchasing "a nutritious dairy beverage at a lower price than fresh drinking milk." [36] Second, they allege that they are deprived "of a stabilizing market influence," since "[a] reconstituted fluid product could quickly expand the fluid milk supply when [seasonal] changes result in a reduction of the whole fluid milk supply." [37] Appellees maintain that these injuries fail to meet the constitutional standard of concreteness. They argue that since milk powder is available to Consumers at retail markets, Consumers could buy the powder and reconstitute the milk themselves at less than the price of whole milk. Thus, appellees contend, the injury asserted by Consumers is merely an objection to the taste of reconstituted milk from products presently

[34] *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C.Cir. 1977) (citing *United States* v. *SCRAP*, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973)).

[35] *Id.* at 715.

[36] Plaintiffs' Complaint at ¶ 28, *reprinted in* JA at 25-26.

[37] *Id.* at ¶ 31, JA at 26.

marketed at retail. This, they claim, is not a definable and discernible injury. However, even assuming appellees are correct in asserting that undesirable taste is an insufficient injury,[28] their argument is still unpersuasive.

In determining whether a plaintiff has alleged a definable and discernable injury, the focus is on the plaintiff's *allegations*, *not* on the availability of alternative remedies. Consumers allege that they are being deprived of a lower priced alternative to whole milk. If these allegations are true, as we must assume, Consumers have been injured economically, even if they could ameliorate this injury by purchasing some alternative product. Further, if as Consumers allege, the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply, they have sustained a further injury. At the trial Consumers may be unable to prove that they have actually sustained these injuries, but their allegations meet the constitutional requirement of injury in fact.[29]

b. *Causation* (connection between the alleged injury and the defendant's actions)

In order to establish the second constitutional element of standing, a plaintiff must show that the in-

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[28] Although we do not decide the issue, such an injury *may* be sufficient since " '[a]*esthetic* and environmental well-being, . . . are important ingredients in the quality of life in our society.' " *Duke Power*, 438 U.S. at 74 n. 18, 98 S.Ct. at 2631 n. 18 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972)) (emphasis added).

[29] There is no dispute over the adequacy of the connection between the alleged injury and Consumers. Nor could there be since Consumers allege that *they* have been deprived of a lower cost milk alternative and of the stabilizing influence that product would bring to the dairy market.

jury " 'fairly can be traced to the challenged action.' " [40] Although this requirement has not been applied consistently in all cases,[41] it is met if the plaintiff alleges a *fairly* traceable connection between the defendant's action and the alleged injury. A plaintiff need only make a reasonable showing that "but for" defendant's action the alleged injury would not have occurred.[42] Consumers have sufficiently established this connection.

Consumers allege that when the compensatory payment is added to the other costs incurred by a handler in producing reconstituted milk, the resulting price makes reconstituted milk products uncompetitive with fresh milk.[43] They claim that "but for" the regulation, handlers would be able to market reconstituted milk for less than fresh milk and that, as a result, reconstituted milk would be available at a lower retail price than whole milk. Appellees dispute the factual basis of Consumers' allegations. According to appellees, the market structure of the dairy industry is so complex that it is impossible to determine whether lower handler costs would have been passed on to Consumers. Thus, appellees argue, it cannot be said with any certainty that the challenged regulation is the cause of Consumers' injury. Again, however, appellees' argument misses the mark.

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[40] *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 41, 96 S.Ct. at 1925).

[41] *See Nichol, supra* note 28 at 196; Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO.L.J. 1157, 1158 n. 7 (1982).

[42] *Duke Power*, 438 U.S. at 74-75, 98 S.Ct. at 2630-31.

[43] Plaintiffs' Complaint at ¶ 26, JA at 25.

It may well be that the structure of the dairy market is so complex that a reduction in handler costs does not inevitably result in lower consumer prices. Nonetheless, Consumers are not required to *prove* that lower prices will result, they are only required to *assert* a *fairly* traceable causal connection between the challenged action and the alleged injury. Consumers' contention that if handlers were not required to make a compensatory payment they would pass the savings on to the consumer is a reasonable one. Nothing more is required. If standing depended on a plaintiff's ability to allege uncontrovertible facts, there would be very few plaintiffs who could establish standing in a lawsuit of any complexity. Having alleged a reasonable connection between the challenged regulations and their alleged injuries, Consumers are entitled to a trial on the merits to determine what the facts really are.[44]

c. *Redressability* (connection between the alleged injury and the action requested of the court)

The third element of the Art. III limit on standing is met when a plaintiff establishes that his alleged injury " 'is likely to be redressed by a favorable deci-

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[44] Had Consumers' allegations been insufficient to establish the requisite causal link, the defect would have been corrected by Consumers' proffered evidence that in those areas not covered by federal milk market orders reconstituted milk had been and was being manufactured and sold to consumers for less than the price of fresh milk, JA at 66, and by affidavits of milk handlers indicating that the regulations raised the price of reconstituted milk so as to make it uneconomical to produce. *CNI* v. *Block*, No. 80-3077, *slip op.* at 6 (D.D.C. 29 Sept. 1981).

sion.' " [45] The degree of likelihood required is not completely clear.[46] However, because the relevant inquiry is directed to the effect of a future act (the court's grant of the requested relief) it would be unreasonable to require the plaintiff to *prove* that granting the requested relief is *certain* to alleviate his injury. Furthermore, as cases such as the present one show, litigation often "present[s] complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed." [47] Thus, a court should be careful not to require too much from a plaintiff attempting to show redressability, lest it abdicate its responsibility of granting relief to those injured by illegal governmental action.

Consumers argue that they have established the required likelihood of redress by producing a United States Department of Agriculture Impact Statement which predicts that if the compensatory payment requirement were eliminated, consumers nationwide would save $186 million annually within three years,[48] and by offering evidence that handlers in non-regulated areas have manufactured and marketed lower-priced reconstituted milk.[49] The district court found this

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[45] *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 38, 96 S.Ct. at 1924). *See also Gladstone, Realtors*, 441 U.S. at 180, 99 S.Ct. at 1608; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977).

[46] *See* Nichol, *supra* note 28, at 201-13.

[47] *Id.* at 215.

[48] 45 Fed. Reg. 75,956, 75,971 (1980), *reprinted in* JA at 77.

[49] *Id.* at 75,960, JA at 66.

showing inadequate because the same USDA statement relied upon by Consumers estimated that elimination of the compensatory payment requirement would cost milk *producers* $576 million. The court observed that this drop in producer earnings "*might* interfere with the public's access to an adequate supply of milk and *might* result in higher prices for milk products." [80] The court concluded that since the structure of the dairy industry is so complex, "any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative." [81] We conclude that the district court required too much of Consumers.

Admittedly, it is hard to predict the effect of removing the compensatory payment requirement, but Consumers produced evidence indicating that the *immediate* result of removing the contested regulation will be increased savings for all consumers. The possibility that the change would also harm producers is relevant to the standing issue only in that such a harm *might* cause market disruptions which *might ultimately* harm Consumers. Whether the potential long term deleterious effects of the requested change outweigh the potential immediate benefits is a question the court will have to resolve in order to determine the validity of the regulation. However, Consumers should not be required to prove that the potentially harmful effects will not occur in order to establish standing. As the Supreme Court has observed, a plaintiff is not required to negate every "speculative and hypothetical possibilit[y] . . . in order to demonstrate the likely effectiveness of judicial relief." [82] Re-

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[80] *CNI, slip op.* at 7 (emphasis added).

[81] *Id.*

[82] *Duke Power*, 438 U.S. at 78, 98 S.Ct. at 2633.

quiring Consumers to show more than they did in this case forces them to prove their case in order to acquire standing. This is not what the Constitution requires. The redressability element of Art. III is designed to bar disputes which will not be resolved by judicial action. It does not prevent a court from hearing a case which may ultimately be unsuccessful.

2. *Prudential Considerations*

As noted above,[53] there are valid nonconstitutional requirements which a plaintiff may be required to meet in order to establish standing. The district court found that one of these, the zone of interests requirement, had not been met by Consumers. On appeal, appellees point to another nonconstitutional standing requirement which they claim Consumers have not satisfied—the requirement that the alleged injury be more than a generalized grievance. We hold that Consumers have satisfied both of these requirements.

a. *Zone of Interests* (connection between the alleged injury and the relevant statute)

The Supreme Court has stated that a plaintiff may be dismissed for lack of standing if his alleged injury is not "arguably within the zone of interests protected or regulated by the statute . . . in question."[54] Whether Consumers' alleged injuries are arguably within the zone of interests protected by the relevant statute in this case depends on which statutes are relevant.

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[53] *See* text at notes 29-32 *supra*.

[54] *Association of Data Processing Service*, 396 U.S. at 153, 90 S.Ct. at 829.

Consumers point to two portions of the AMAA policy section which indicate an intent to protect consumers from the type of injuries they have allegedly incurred. Section 602(2) expresses Congress' intent to protect consumers against unwarrantably rapid or excessive price increases by limiting the Secretary's authority to fix prices at parity and no higher.[55] Section 602(4) expresses the policy of protecting consumers from "unreasonable fluctuations in supplies and prices."[56] The district court, relying on this court's opinion in *Tax Analysts and Advocates* v.

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[55] In full section 602(2) provides:

It is declared to be the policy of Congress—

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

7 U.S.C. § 602(2) (1976).

[56] 7 U.S.C. § 602(4) (1976). The entire section provides:

It is declared to be the policy of Congress—

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

Blumenthal,[57] held that these sections were not relevant to the present suit, pointing out that the challenged regulations were issued pursuant to section 608c which does not mention consumers.

In *Tax Analysts* we held that the general policy section of a statute may be read in conjunction with the challenged portion only if the two parts of the statute share "an identity of purpose."[58] The district court ruled that section 608c and sections 602(2) and (4) do not share this identity of purpose. The court noted that section 608c was enacted as part of the original AMAA in the 1930's and that it dealt solely with milk market orders.[59] Section 602(4), on the other hand, was added to the AMAA in 1954. Relying extensively on legislative history,[60] the court concluded that the 1954 amendment was designed to counter the falling farm prices caused by the surplus of commodities after the Korean War and that the expressed intent to protect consumers was limited to situations involving price supports and parity pricing. Thus, in the district court's view, section 602(4) was not a "relevant statute" since it was enacted at a different time, in response to a different problem than section 608c. The court also found section 602(2) irrelevant since it dealt with parity pricing and not milk market orders. However, the district court's ap-

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[57] 586 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

[58] *Id.* at 141.

[59] Section 608c gives the Secretary authority to issue market orders for a variety of agricultural commodities, but milk is the only one with which this litigation is concerned.

[60] H.R. REP. No. 1927, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3399.

proach in analyzing the identity of purpose issue, although undeniably thorough in its own right, was not consistent with the reasoning we utilized in *Tax Analysts*. As a result, the district court failed to reach the correct result.

In *Tax Analysts* we stressed the "generous nature" of the zone of interests test.[61] In particular we noted that a plaintiff was only required to assert an interest "which is *arguable from the face of the statute.*"[62] Consumers have clearly done this much. Although section 608c deals exclusively with the Secretary's authority to issue market orders, it is not immunized from the effect of the general policy sections. Section 608c(4) requires the Secretary to find that an order "will tend to effectuate the declared policy of this chapter" before he issues that order.[63] The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and consumers*, an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices.*"[64] Since Consumers allege that the challenged

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[61] 566 F.2d at 142.

[62] *Id.* (emphasis added).

[63] 7 U.S.C. § 608c(4) (1976).

[64] 7 U.S.C. § 602(4) (1976) (emphasis added).

The dissent argues that the references to consumer interests are mere "pious platitudes" which have "no real bearing" on the issue of standing. Dissent at [40a, *infra*]. The references to consumers may be pious, but Congress expressly directed the Secretary to take those "platitudes" into account when issuing a milk market order, 7 U.S.C. § 608c(4) (1976), and to terminate any order that does not effectuate them. *Id.* § 608c (16)(A).

portion of the milk market orders prohibits the sale of reconstituted milk, resulting in higher milk prices and seasonal shortages, they have asserted an interest which is at least "arguably" within the zone of protected interests.[65] The district court's efforts to distinguish the two sections by examining the legislative history in great detail is simply inconsistent with the purposes behind the zone of interests test.[66]

b. *Generalized Grievance*

The Supreme Court has noted that even when a plaintiff meets the Art. III standing requirements, a federal court may refrain from adjudicating issues which "amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the

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[65] In almost any regulatory scheme some interests will be more directly affected than others. However, contrary to the dissent's argument, this does not require us to dismiss those whose interests may be less directly affected. As this court has observed, "the challenging party need only show that it is an intended beneficiary of the statute not necessarily the primary one." *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1189 (D.C. Cir. 1972).

[66] As we noted in *Tax Analysts*:

> [A] full-scale examination of legislative history presents the distinct possibility that the generous nature of the zone test, which results from the language of the test itself, will be undermined. Such an approach may lead to a requirement that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected. Any tendency to move in this direction would detract from the flexibility of the zone standard provided by the requirement that the plaintiffs' interest be only "arguably" within the zone.

566 F.2d at 142.

representative branches."[67] Appellees argue that Consumers' injury falls into this category since it is an injury suffered in "some indefinite way in common with people generally."[68] However, a review of the cases relied on by appellees[69] and an examination of the argument they advance[70] make it apparent that they confuse this prudential consideration with the constitutional requirement of injury in fact.[71] As

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[67] *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500, 95 S.Ct. at 2205-06).

[68] *Frothingham* v. *Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923).

[69] *E.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) ("Abstract injury is not enough"); *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 706, 715 (D.C.Cir. 1978) (the injury "must be perceptible, concrete, specific . . . .").

[70] It is in this section of his brief that the Secretary makes the argument that Consumers' injury amounts to no more than an "objection to the taste of reconstituted milk from powder presently marketed at retail . . . ." Fed. Appellees Brief at 25. *Cf.* text at note 38, *supra*.

[71] Appellees' confusion is understandable given the Supreme Court's failure consistently to articulate whether the generalized grievance restriction is a prudential or a constitutional limit. *See* Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate*, 70 Geo.L.J. 1157 (1982). Indeed, the Supreme Court contributed to this confusion in *Valley Forge* by clearly labeling the generalized grievance as a prudential consideration in one part of the opinion, 454 U.S. at 474-75, 102 S.Ct. at 759-60, and then later noting that the " *'case or controversy'* aspect of standing is unsatisfied 'where a taxpayer seeks to employ a federal court as a forum in which to air his *generalized grievances* about the conduct of government or the allocation of power in the Federal System.' " *Id.* at 479, 102 S.Ct. at 762 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1955, 20 L.E.2d 947 (1968)) (emphasis added).

we have already noted,[72] Consumers' alleged injury is sufficiently definable and discernable to meet the constitutional requirement and appellees' efforts to litigate this issue under a new title must be rejected.

Consumers' injury is a generalized grievance only in the sense that it is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk. It may be argued that the widespread nature of the injury requires us to dismiss the claim as a generalized grievance. However, we refuse to believe that the mere fact that a plaintiff's injury is shared by many people requires a court to dismiss his complaint. If dismissal were required in such cases, consumer injuries would never be justiciable because "[c]onsumer injuries, by their very nature tend to be shared in common by many other similarly situated individuals." [73] Although it is not clear what the limits of the generalized grievance restriction are,[74]

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[72] *See* text at notes 34-39 *supra*.

[73] *Cutler* v. *Kennedy*, 475 F.Supp. 838, 848 n. 23 (D.D.C. 1979).

[74] It is not clear whether the restriction has ever been applied as a nonconstitutional limit. Supreme Court cases relying on the generalized grievance restriction as a ground for denying standing seem to have been decided on *constitutional* grounds. *See, e.g., Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974) ("Such a generalized interest . . . is too abstract to constitute a 'case or controversy' . . . ."); *United States* v. *Richardson*, 418 U.S. 166, 179-80, 94 S.Ct. 2940, 2947-48, 41 L.Ed.2d 678 (1974) ("to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . or a 'particular, concrete injury' . . . or 'a direct injury,' . . . in short, something more than a generalized grievance.") (citations omitted). The cases in which the generalized grievance restriction has been clearly labeled as a prudential consider-

we hold that the mere fact that the injury may be shared by many consumers does not require us to dismiss this complaint on that ground.

Finding that neither constitutional nor prudential considerations prevent Consumers from bringing the present action, we reverse the district court and hold that Consumers have standing.[75]

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ation have not used it as a ground for decision. *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205; *Gladstone, Realtors*, 441 U.S. at 100, 99 S.Ct. at 1608. Therefore, the scope of the restriction as a nonconstitutional limit is not clear.

It is also unclear whether the restriction serves an independent purpose. In *Warth* the Court noted that prudential limitations like the generalized grievance restriction were required because otherwise "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." 422 U.S. at 500, 95 S.Ct. at 2306. *See also Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 780. If a question is abstract, the *constitutional* limits on standing require dismissal. If on the other hand, the concern is that other governmental institutions are more competent to address the question, the political question doctrine, a prudential consideration, would appear to require dismissal. *See Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[75] We also reject appellees' argument that Congress has impliedly precluded consumers from challenging milk market orders. Appellees rely on *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 230, 34 L.Ed.2d 188 (1972), in which the 9th Circuit held that Congress had precluded judicial review of consumer challenges to milk market orders. In *Rasmussen* the court noted that while the AMAA provides a special review procedure for handlers affected by a milk market order, it does not provide a similar procedure for consumers. The court found that this omission was deliberate because: (1) "the whole structure of the Act

C. *CNI's Organizational Standing*

Community Nutrition Institute (CNI) is a non-profit charitable organization specializing in food and nutrition issues. CNI seeks to establish standing as an organization in its own right. The district court held that CNI failed to meet the standing requirements and accordingly, dismissed the organization.

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contemplates a cooperative venture between the Secretary, the producers, and the handlers," *id.* at 599; (2) to grant standing to consumers would defeat Congress' intent that all challenges be initially considered by the agency rather than the courts, *id.* at 599-600; and (3) granting standing to consumers would encourage handlers to bypass the agency by finding a consumer who would lend his name to a suit challenging the order. *Id.* at 600.

We conclude that this does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, *see, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1977), especially since no legislative history or statutory language is cited. *See National Association of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 942 (D.C. Cir. 1982). The mere fact that review is expressly provided for handlers is not conclusive. *See Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944) (producers can challenge the administration of a milk market fund, even though there was an express judicial review provision for handlers but not for producers). Moreover, if Congress intended to channel all challenges through the agency, producers should also be required to follow that route. Yet, several courts have concluded that challenges by producers may be heard by courts without first being considered by the Secretary. *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 83 (2d Cir. 1974); *Jones* v. *Bergland*, 456 F.Supp. 635, 641-42 (E.D.Pa. 1978). Finally, the Ninth Circuit's concern over handler-consumer collusion is an inadequate basis for inferring *congressional* intent. In the absence of some evidence that Congress at least considered the issue, we refuse to hold that Congress intended to leave consumers without a remedy.

Because we conclude that CNI has not met the constitutional requirements of standing, we affirm the district court on this issue.

1. *Injury in fact*

CNI alleges that it has suffered two injuries as a result of the allegedly illegal compensatory payment requirement: (1) the requirement obstructs CNI's institutional interest in "seeing that consumers" have nutritious fluid dairy products available at the lowest possible price;[76] and (2) it prevents CNI from fully achieving its educational objective of informing low-income individuals about sources of low-cost nutritional food.[77] Only the later allegation satisfies the injury in fact requirement.

An obstruction of an organization's interest in "seeing" that consumers have nutritious fluid products available at the lowest possible price is not the type of definable and discernible injury that permits an organization to establish standing. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*[78] the Supreme Court held that an organization interested in seeing that poor people had access to health services, "could not establish . . . standing on the basis of that goal."[79] The Court, citing *Sierra Club* v. *Morton*,[80] noted that "an organization's abstract concern with a subject that could be affected by an ad-

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[76] Appellants' Brief at 23. *See also* Plaintiffs' Complaint at ¶ 5, JA at 21.

[77] *Id.*

[78] 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1978).

[79] *Id.* at 39-40, 96 S.Ct. at 1924-25.

[80] 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

judication does not substitute for the concrete injury required by Art. III." [81] In *Sierra Club* the Court held that an injury to the Sierra Club's institutional interest in seeing that the nation's natural resources were protected from man's degradation was not a sufficient basis for establishing standing.[82] CNI's interest in "seeing" that consumers have the nutrition they need at the lowest possible price is the same type of abstract interest which the Supreme Court held was insufficient in *Eastern Kentucky Welfare Rights* and *Sierra Club*.

CNI cites *CNI* v. *Bergland* [83] as support for its contention that its alleged injury is sufficient to establish standing. In *Bergland* the court held that CNI had standing as a *representative* of consumers to challenge regulations implementing the National School Lunch and Breakfast program. The court noted that CNI had standing because it was an organization "*speaking for individuals*, whose health and nutrition interests are affected by the Secretary's action." [84] In the present case CNI seeks to establish standing on the basis of its *institutional* interests. It is not acting as a spokesman for individual consumers.[85]

CNI further seeks to shore up its argument by citing *Havens Realty Corp.* v. *Coleman*.[86] In *Havens Realty* the Supreme Court held that a plaintiff orga-

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[81] 426 U.S. at 40, 96 S.Ct. at 1925 (citations omitted).

[82] 405 U.S. at 739-741, 92 S.Ct. at 1368-69.

[83] 493 F.Supp. 488 (D.D.C. 1980).

[84] *Id.* at 492 (emphasis added).

[85] CNI has not alleged that its members have been injured as a result of the challenged action. *Cf. Warth*, 422 U.S. at 511, 95 S.Ct. at 2211.

[86] 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

nization had institutional standing because it alleged that defendant's racial steering practices frustrated "its efforts to assist equal access to housing through counseling and other referral services." [87] CNI argues that their alleged injury is identical to that alleged by the organization in *Havens Realty*. However, the Court in *Havens Realty* noted that the defendant's actions interfered with the "organization's *activities*," distinguishing those activities from the "organization's abstract social interests." [88] In the present case CNI claims it has an interest in "seeing" that consumers receive dairy products at the lowest possible price. It does not allege that it assists them in doing this, nor does it allege that the contested regulation impedes it from assisting consumers. It seeks standing on the basis of its abstract interest in seeing that consumers achieve this goal. Such an injury is not sufficiently concrete to establish standing.

CNI's second *alleged* injury does meet the injury in fact requirement. If, as CNI alleges, it has been prevented from informing low-income individuals about sources of low-cost food, it has suffered a definable and discernible injury because it would be prevented from carrying out one of its primary activities.[89] However, this alleged injury cannot be the basis for establishing standing in this case because CNI has failed to establish *any connection* between the alleged injury and the challenged regulation.

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[87] *Id.* at 379, 102 S.Ct. at 1124.

[88] *Id.* (emphasis added).

[89] *See Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1086 n. 28 (D.C. Cir. 1973).

2. *Causation*

CNI alleges that the challenged regulation interferes with its efforts to inform low-income individuals about the sources of low cost food. However, CNI fails to assert *any* reasonable connection between that injury and the Secretary's actions. Nothing in the challenged regulation affect CNI's ability to inform consumers about sources of low cost food. Thus, this case is distinguishable from *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*,[90] on which CNI relies. In *Scientists' Institute* this court held that an association's educational activities were impaired by the AEC's refusal to prepare an impact statement. In the present case the Secretary has made a study of the effect of removing the contested portion of the milk market orders and has made that information available to the public. The contested regulation has no impact on the availability of information which CNI seeks to disseminate. It may limit the availability of low-priced dairy products, but that is not the injury of which CNI complains. CNI has failed to establish any connection between the Secretary's action and an injury to its educational activities. Having failed to satisfy the constitutional requirements of standing, CNI is precluded from litigating the issues on the merits.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Appellant Joseph Oberweis is a handler of milk products. It is undisputed that he has standing to bring the present suit.[91] Nevertheless, the district court dismissed Oberweis, holding that he failed to

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[90] 481 F.2d 1079 (D.C. Cir. 1973).

[91] *See* 7 U.S.C. § 608c(15)(A) (1976).

exhaust his administrative remedies. Oberweis admits that he has not meticulously followed the statutory procedures for filing a "handler petition" under section 608c(15)(A),[92] but he argues that he should not be required to file another petition because he has substantially complied with the requirements of that section. We must reject that argument, however, because of the context in which the present action arose.

The present action is *not* an appeal from the Secretary's decision denying the petition filed by Oberweis and the other appellants in 1979. The complaint in this action was filed 2 December 1980, four months *before* the Secretary acted on the 1979 petition. In the complaint appellants asked the court, *inter alia*, to hold that the Secretary's *refusal to act* on the petition was arbitrary and capricious,[93] but they did not

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[92] *Id.*

In full the section provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

Section 608c(15)(B) vests federal district courts with jurisdiction to review the Secretary's ruling on a section 15(A) petition. *Id.*, § 608c(15)(B).

[93] Since the Secretary ultimately acted on the petition, appellants' complaint concerning his refusal to act is now moot.

seek review of the decision itself. Appellants challenge the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; their complaint did *not* attack his subsequent refusal to correct that alleged wrong. Thus, Oberweis' argument that he substantially complied with section 15(A) by joining the other appellants in filing a petition in 1979 is misguided since he is not seeking a review of the Secretary's decision with respect to that petition. If Oberweis wants a court to decide whether his 1979 petition substantially complies with the exhaustion requirements of section 15(A) he will have to challenge the Secretary's decision on *that* petition. We express no opinion on the validity of Oberweis' argument in that respect because the present case does not involve that petition.

Since Oberweis is not appealing from a ruling in which he first petitioned the Secretary for relief, we hold that he has not exhausted his administrative remedies as required by the statute.[94]

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[94] Unlike Oberweis, Consumers are not required to follow the procedures outlined in section 15(A) because they are not covered by that section, which deals with handlers only. Nor is there any basis for inferring that Consumers should be subject to the same requirements. Section 15(A) was designed to prevent a handler (who is the only party subject to liability for violating a milk market order) from needlessly interrupting enforcement proceedings initiated by the Secretary against the handler. *See United States* v. *Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). The exhaustion requirement of section 15(A) thus establishes "an equitable and expeditious procedure for testing the validity of orders, *without hampering the Government's power to enforce compliance* with their terms." H.Rep. No. 1241, 74 Cong., 1st Sess. 14 (1935) (emphasis added). Since a suit by a group of consumers will not directly interfere with any pending enforce-

IV. Conclusion

The individual consumers in this case established a definable and discernible injury and the proper connection between that injury and the various aspects of the suit. The district court's insistence that they prove more than they did was improper. A plaintiff is not required to prove his case in order to acquire standing. The district court did, however, correctly conclude that CNI failed to satisfy the constitutional elements of standing. An organization cannot establish standing on the basis of its abstract interest in seeing that justice prevails. The district court was also correct in its decision to dismiss Oberweis.[96] Accordingly, the district court's opinion is affirmed in part and reversed in part, and the case is remanded to the district court for a decision on the merits.

It is so ordered.

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ment proceedings, there is no reason to stretch section 15(A) beyond its express limits. *Cf. Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 83 (2d Cir. 1974) (producer allowed to challenge milk market order without first petitioning the Secretary for relief); *Jones* v. *Bergland*, 456 F.Supp. 635, 641-42 (E.D.Pa. 1978) (producer not required to exhaust administrative remedies because he had no remedies to exhaust).

[96] Because this action is not an appeal from a ruling under 7 U.S.C. § 608c(15)(A), the district court's jurisdiction will exist under 28 U.S.C. § 1331, rather than 7 U.S.C. § 608c (15)(B). Nevertheless, the district court's scope of review is still somewhat limited. The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted*. *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 84 (2d Cir. 1974). *See generally* K. Davis Administrative Law Treatise § 5.03, at 299 (1958).

SCALIA, Circuit Judge, concurring in part and dissenting in part:

I join Part II C of the Court's opinion, which affirms dismissal of Community Nutrition Institute for lack of standing. I concur in the result of Part III, affirming the dismissal of Oberweis, but would rest dismissal upon the ground assigned by the district court: the failure to exhaust administrative remedies. I dissent from the Court's action in reversing the district court's dismissal of the individual consumers, who in my view were correctly found to lack standing.

THE INDIVIDUAL CONSUMERS

This suit challenging federal agency action invokes the "generous review provisions" [1] of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1976), which have "greatly expanded the availability of judicial review," [2] conferring standing where preexisting "prudential limitations" would exclude it.[3] The zone of interest test was originally formulated to describe the application of these statutory provisions.[4] Although it has subsequently been used in non-APA cases, to describe one of the prudential

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[1] *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51, 75 S.Ct. 591, 594, 99 L.Ed. 868 (1955).

[2] *Heillika* v. *Barber*, 345 U.S. 229, 232, 73 S.Ct. 603, 604, 97 L.Ed. 972 (1953).

[3] *See Sierra Club* v. *Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972).

[4] *See id.* (citing *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970)).

limitations upon standing in general,[5] its application in that context is not likely the same. The Supreme Court's most recent recitation of the "arguably within the zone of interests" formula in a non-APA case omits the word "arguably."[6]

In a suit such as this, however, seeking review of action by a federal agency, the original formulation in all its liberality applies. When interpreting its meaning, one must bear in mind that the test represents not an independent judicial prescription, but a judicial attempt to ascertain legislative intent. It is supposed to indicate when Congress intended to make a particular litigant "a proper party to request an adjudication of a particular issue."[7] In the context of suits challenging agency action it is meant to determine whether Congress intended the plaintiff to serve as a "private attorney general,"[8] "to bring to the attention of the appellate court errors of law" by the Executive branch.[9]

The test becomes a progressively weaker indication of such intent as the breadth of the zone of interests within which the plaintiff claims his interests lies is

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[5] *See, e.g., Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n. 6, 99 S.Ct. 1601, 1608 n. 6, 60 L.Ed.2d 66 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-21 n. 3, 97 S.Ct. 599, 602-03 n. 3, 50 L.Ed.2d 514 (1977).

[6] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982).

[7] *Sierra Club* v. *Morton*, *supra* note 3, 405 U.S. at 732 n. 3, 92 S.Ct. at 1364 n. 3 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 30 L.Ed.2d 947 (1968)).

[8] *Association of Data Processing Service Organizations* v. *Camp*, *supra* note 4, 396 U.S. at 154, 90 S.Ct. at 830.

[9] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940).

increased. Thus, in *Data Processing*, *supra* note 4, it was eminently reasonable to conclude that Congress intended a proscription against the Comptroller General's allowance of competition to be enforceable in the courts by one of the injured competitors. It would be less reasonable, however, to conclude that a legislative directive to the Comptroller General to audit all banking institutions displays a congressional intent to permit suit by all bank depositors. The reason for the difference is the same as the reason underlying the "generalized grievance" thread of judicially imposed limitations upon standing[10]: Governmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many. Thus, for such matters it is less likely that Congress intended the creation of private attorneys general to supplement, through the courts, the President's primary responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

Even so, where the statute in question seeks to protect nothing but generalized interests, a "hospitable" interpretation of the APA may justify placing that entire class within its expanded prescription of standing. That was the case, for example, with the National Environmental Policy Act, which was directed not to the protection of any narrow group or class, but to the preservation of the environment for the benefit of the entire country. The Supreme Court found that anyone who used the natural resources as-

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[10] *See, e.g., Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217-20, 94 S.Ct. 2925, 2930-31, 41 L.Ed.2d 706 (1974); *United States* v. *Richardson*, 418 U.S. 166, 176-80, 94 S.Ct. 2940, 2946-48, 41 L.Ed.2d 678 (1974); *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937).

sertedly affected by disregard of the Act had standing to sue.[11] It is quite another matter, however, when a statutory provision benefits generalized interests *through the protection of more particularized interests to which it is immediately directed.* Almost any statute has generalized indirect benefits; ultimate improvement of the society at large is the whole theoretical justification for heeding the requests of "special interests." But where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated "private attorneys general" is weak indeed. In such circumstances the whole premise of the liberalized standing provisions no longer applies:

> The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.[12]

The consumer plaintiffs in the present case are indirect general beneficiaries. The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. Even before adoption of the APA, the courts found a congressional intent to permit them to sue.[13]

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[11] *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

[12] *Barlow* v. *Collins*, *supra* note 4, 397 U.S. at 167, 90 S.Ct. at 838.

[13] *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944).

On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. Congress expressly gave them standing to obtain judicial review in the AMAA itself. 7 U.S.C. § 608c(15)(B) (1976). In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

Consumer interests with regard to milk marketing orders can be consequential to *either* milk handlers' interests (as in the present case) *or* producers' interests. The latter would be the situation if not high prices (or, what ultimately amounts to the same, the unavailability of a ready substitute to augment fluid milk supplies at the retail level) but rather inadequacy of production were the gravamen of the complaint. In my view, consumers would have standing in neither situation, but their case is particularly weak in the former, where the primary vindicator of the generalized interest in question is specifically designated by judicial review provisions of the statute itself. It is true enough, as *Stark* v. *Wickard*, *supra* note 13, amply demonstrates,[14] that explicit provision for review by one class of interests does not necessarily imply an absence of intent to provide review to other interests whose grievance is quite distinct. But where, as in the present case, the second

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[14] *See* the dissent of Frankfurter, J., 321 U.S. at 317, 64 S.Ct. at 574.

grievance is entirely derivative of the first—where consumers complain that they will have to pay more *because* milk handlers will have to pay more—then the statutory review provision does suggest that the more remote group was not meant to have standing to sue.

My conclusion is unaffected by the allusions to consumer interests in the general purpose section of the act, 7 U.S.C. § 602(2), (4) (1976). With regard to an interest so generalized, they seem to me to represent, if not (as the Ninth Circuit said in a case contradicting the majority's holding here) "pious platitudes," [15] then at least no more than a recital of the ultimate purpose of the statutory scheme which has no real bearing upon who was expecetd to enforce it.

APPELLANT OBERWEIS

I concur in affirming the district court's dismissal of the milk handler's suit. I would base the affirmance, however, upon the ground used by the district court: failure to exhaust administrative remedies.

Before us and the district court, Oberweis makes the same claim as the other appellants, that the milk marketing order was invalid. He does not seek to appeal denial of the 1979 petition for rulemaking, in which he joined the other appellants in alleging, among other things, invalidity of the order; but he asserts that the filing and denial of that petition satisfied the requirement that he exhaust his § 608c (15)(A) remedies—a requirement that does not apply to the other appellants. If I understand the majority opinion correctly, its dismissal of Oberweis's complaint is based upon the proposition that when

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[15] *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 230, 34 L.Ed.2d 188 (1972).

a requirement of exhaustion of administrative remedies exists, appeal must be taken from the agency denial that constitutes the exhaustion, and the grievance cannot be brought to court in any other fashion. That may be correct, but I have some doubt, since it seems a most rigid application of a doctrine that is generally quite flexible—so that, for example, exhaustion is excused entirely when it would obviously be unavailing.[16] I prefer, therefore, to rest my disposition of this aspect of the case upon what seems to me surer ground: that Oberweis's petition could not in any event comply with the exhaustion requirement.

As the majority opinion notes, Oberweis is forced to admit that he "has not meticulously followed the statutory procedures for filing a 'handler petition'." (Maj. Op. at [32a, *infra*].) That admission is an understatement. The real problem is not how Oberweis framed his demand, but what he demanded and was provided. He was entitled to ask for and receive a formal adjudicatory hearing that would produce a ruling on the legality of the challenged order. That proceeding would be conducted before an administrative law judge, and the relative merits of Oberweis's assertions and the Secretary's position would be tested and reviewed on the basis of record evidence.[17] What Oberweis sought, however, was a hearing of quite a different sort inquiring into quite a different question—an informal rulemaking proceeding to decide whether the order should be revised.

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[16] *See American Federation of Government Employees* v. *Acree*, 475 F.2d 1289 (D.C.Cir. 1973); *Wolff* v. *Selective Service Local Board*, 372 F.2d 817 (2d Cir. 1967).

[17] 7 U.S.C. § 608c(15)(A) (1976); 7 C.F.R. § 900.50-900.71 (1982). *See* 5 U.S.C. §§ 554, 556-557 (1976 & Supp. IV 1980).

There the decisionmaker would not be limited to record evidence, assertions would not be tested by cross-examination, and (evidently of some importance to those with whom Oberweis made common cause) persons other than producers and handlers would be permitted full participation. In fact, to be entirely accurate Oberweis sought even less than this—namely, merely consideration of *whether* such a rulemaking proceeding would be desirable. The situation is thus quite different from that in cases such as *Joseph* v. *FCC*, 404 F.2d 207 (D.C.Cir. 1968), in which a belated request for public hearing was held to be the equivalent of a motion for reconsideration. There the nature of the consideration which the agency would be compelled to give the two requests was substantially identical; here it is not.

The Secretary gave Oberweis no more than the type of consideration and the scope of determination he requested—which was less than he was required to seek before applying to this court. One can hardly blame the Secretary for not treating the request as (what it clearly was not) a demand for a § 608c (15) (A) proceeding. The first sentence of the petition stated that it was filed "pursuant to" 5 U.S.C. § 553, the general rulemaking provision of the APA and 7 C.F.R. § 1.28, the provision of the agency regulations addressing the filing of petitions for rulemaking. Moreover, the petition was joined by the consumer plaintiffs who had no standing to participate in a § 608c(15)(A) proceeding. Oberweis was not misled regarding the agency's treatment of the petition, since his attorney was advised that, insofar as claims of illegality were concerned, "§ 608c(15)

(A) and (B), provides the means through which any handler . . . may seek legal recourse." [18]

It might be asserted, I suppose, that the agency was too generous in entertaining Oberweis's petition; and that if it did not insist upon the exclusiveness of his § 608c(15)(A) remedy in the administrative proceedings it cannot now do so before the courts. In fact, however, the agency is not asserting that his § 608c(15)(A) remedy is *exclusive*—only that it must be pursued before an attack upon the marketing order itself may be taken to the courts. Nothing prohibits a handler from petitioning for a rulemaking if he wishes, but that petition may, within what has hitherto been considered the broadest discretion, be denied. What the doctrine of exhaustion requires is that in order to challenge the substance of the marketing order the handler must resort—before or after the denial of this discretionary relief—to the much more categorical claim he has upon the agency's attention, namely his right to obtain a full-dress adjudicatory hearing resulting in a ruling on the validity of the order. No such hearing has been requested or held,[19] and no such ruling has issued.[20]

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[18] Letter from Sec. Bergland to Ronald L. Plesser (Aug. 11, 1980), *reprinted in* Jt.App. at 60.

[19] Indeed, not even an informal public hearing was held, though that was requested and considered. *See* Letter from Ronald L. Plesser (appellants' attorney) to Sec. Bergland (July 1, 1980), *reprinted in* Jt.App. at 57; Letter from William T. Manley, Dep. Administrator, Marketing Program Operations, to Ellen Haas and Thomas B. Smith (CNI) (Apr. 7, 1981), *reprinted in* Jt. App. at 170.

[20] The agency's final response denying the petition specified that "in reviewing the petition for rulemaking purposes,

The situation might be different if the denial of the petition for rulemaking were clear indication that the adjudicatory hearing could be of no avail. It is not. Different procedures are prescribed not for their own sake, but for the different effects which they are likely to have upon the outcome. Even if the Secretary's action in denying Oberweis's petition at the conclusion of the informal proceeding could properly be regarded as a determination that the marketing order is valid, it is not certain that the same determination would have been made in the formal proceeding which Oberweis should have demanded.

For the above reasons, I would affirm in all respects the decision of the district court.

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we have not directed our attention" to "[c]laims that the present regulatory treatment of reconstituted milk is not in accordance with law." Letter from William T. Manley, *supra* note 19, at 175.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

Appeal from the United States District Court
for the District of Columbia

Before: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Jan. 21, 1983]

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and the case is

remanded to the District Court for a decision on the merits, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: January 21, 1983.

Opinion for the Court filed by Circuit Judge Wilkey. Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Mar. 28, 1983]

ORDER

On consideration of the Federal Appellees' petition for rehearing, filed March 7, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Scalia would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL., APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

[Filed Mar. 28, 1983]

ORDER

The suggestion for rehearing *en banc* of the federal appellees has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc*.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Apr. 19, 1983]

ORDER

On consideration of the petition for rehearing of intervenors-defendants-appellees, filed March 25, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Scalia would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

[Filed Apr. 19, 1983]

ORDER

Intervenors-defendants-appellees' suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc.*

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS

v.

JOHN R. BLOCK, ET AL., DEFENDANTS

[Filed Sep. 29, 1981]

MEMORANDUM

This suit against the Secretary of Agriculture and the United States Department of Agriculture seeks the invalidation of certain provisions of the Federal Milk Market Orders ("Orders"). 7 C.F.R. § 1000 *et seq.* (1981). The challenged Orders require the "down allocation" of reconstituted milk products [1] and the payment of compensatory payments on those products to regional producers of fresh milk products. This action also asks the Court to compel the Department to hold a hearing on the plaintiffs' petition for a rulemaking concerning the provisions of the Orders that are at issue. Because plaintiffs Harrell, Desmarais, Weinberg, and Community Nutrition Institute do not have standing in this case and because plaintiff Oberweis has not exhausted his administrative remedies, the complaint must be dismissed for lack of subject matter jurisdiction.

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[1] Reconstituted milk is made by combining dried milk powder, water, and butterfat.

I. *Background.*

The Agricultural Marketing Agreement Act ("AMAA") was enacted to correct the "disruption of the orderly exchange of commodities in interstate commerce." 7 U.S.C. § 601 (1976).[2] Pursuant to the AMAA, Milk Market Orders have been issued and adopted in forty-seven regions of the United States. 7 C.F.R. §§ 1001-1139 (1981). These Orders are designed to ensure that producers within a given region receive a uniform minimum price for their grade A milk whether it is consumed in fluid form or manufactured into milk products. *See* 7 U.S.C. § 608c(5) (1976). The Orders divide milk into classes: Class I milk is sold to consumers for drinking; Class II milk or "surplus" is manufactured into various products.[3] Handlers pay a higher price for Class I milk than they do for Class II milk. *Cf.* 7 C.F.R. §§ 1012.50(a); 1012.40(b).

Producers within an Order Area receive a "blend price," a uniform price based upon how much milk in the area is sold for Class I or Class II purposes. The blend price is the total value of all milk used by all handlers in the three classes, divided by the total volume of milk used. *See United States* v. *Rock Royal Co-op*, 307 U.S. 533, 555 (1939). The greater the amount of milk in Class I the higher the blend price.

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[2] The complex provisions of the AMAA have been explained elsewhere. *See United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939); *Queensboro Farm Products, Inc.* v. *Wickard*, 137 F.2d 969 (2d Cir. 1943). However, a brief review of the relevant provisions is necessary for an understanding of the background of this case.

[3] Some orders divide surplus or manufactured milk into Classes II and III, but for convenience both classes will be termed Class II in this opinion.

See Grant v. *Benson*, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 934 (1956). Each handler whose total use value of milk for a particular reporting period (i.e., each month) exceeds his payments to producers at the blend price must make a payment to the producer-settlement fund for this excess.[4] Conversely, handlers whose use value is below the blend price are paid from the fund.

Milk produced outside an Order Area but sold by handlers in the area is classified as "other source milk." 7 C.F.R. §§ 1012.14, 1079.14 (1981). If this milk is received in bulk form and produced by dairies subject to another Order, it is allocated into classes and priced in the same proportion as locally produced milk. *Id.* § 1012.44. If received in packaged form, other source milk is treated as Class I milk. *Id.* §§ 1012.44(a)(2), 1079.44(a)(3). Milk from areas with no Order is "down allocated" or presumed to be used for Class II purposes, even if actually used in Class I. *Id.* §§ 1012.44(a)(5)(i), 1079.44(a)(8). Thus, local producers receive credit for a Class I price, and the blend price is raised. Moreover, handlers who receive this milk must also make a "compensatory payment" to the producer settlement fund. This payment generally equals the difference between the Class I price and the blend price. *Id.* §§ 1012.71(a)(2)(ii), 1079.60, 1079.71(a)(2)(ii).

Reconstituted milk products were unregulated prior to 1964. After notice and a series of hearings, the Secretary issued the current regulations which treat reconstituted milk as "other source" fresh fluid milk.

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[4] For instance, a handler who supplies only whole milk for consumer consumption will have a use value that exceeds the blend price that he pays to producers and must pay the difference into the fund.

7 C.F.R. §§ 1012.14(c), 1079.14(c) (1981). This milk is assumed to have displaced local milk from Class I, and the entire volume is down allocated to the lower value uses. As a result, a comparable volume of local milk is moved into Class I from lower classes. This raises the blend price. *Cf. id.* §§ 1012.44, 1079.44. If a handler has not manufactured enough Class II or Class III products to account for all the reconstituted milk he produced, the deficit is assigned to Class I, and the handler must make a compensatory payment to the local settlement fund equal to the difference between the lower class price and the Class I price. *Id.* §§ 1012.60(e), 1079.60(d).

On August 23, 1979, the plaintiffs filed a petition with the Secretary asking for repeal of the provisions of the regulations that deal with reconstituted milk. The Secretary published a Notice of Request for Hearing and asked for comments on November 16, 1979. 44 Fed. Reg. 65,989 (1979). Eleven months after the petition was filed, the plaintiffs advised the Secretary that if no action were taken they would consider their petition denied. Subsequently, the Secretary published an economic impact analysis of the petition and invited comments. Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980). This suit was filed on December 2, 1980, and on April 7, 1981, the Secretary denied the petition.

II. *Discussion.*

A. *Standing.*

The Supreme Court has formulated a three-part test to determine whether particular plaintiffs have standing to bring suit: (1) the challenged agency action must cause or threaten to cause the plaintiffs

injury in fact; (2) the alleged injuries must be arguably within the zone of interests sought to be protected by the relevant statute; (3) the relevant statute must not preclude judicial review. *Barlow* v. *Collins*, 397 U.S. 159, 164-65 (1970); *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-57 (1970). The plaintiffs must also demonstrate that their injuries are capable of redress through the remedy requested and that their injuries are caused by the challenged action of the agency defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

1. *Injury in Fact.*

Injury in fact is the threshold issue in every federal case because it determines whether the court has power to entertain the suit. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). This aspect of standing demands that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction" (emphasis in original). *Id.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The injury need not be substantial, *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977), but the injury must be "distinct and palpable," and a "generalized grievance" is not enough. *Warth* v. *Seldin*, *supra*, 422 U.S. at 499. Although indirect harm to a plaintiff will not preclude standing, it will make it more difficult to establish injury in fact by making it more difficult to establish that the injury was a consequence of the defendant's actions and that prospective relief will remove the harm. *Id.* at 505.

In considering a motion to dismiss, the Court must accept as true all material allegations in the complaint and must construe the complaint in favor of the plaintiffs. *Warth* v. *Seldin*, *supra*, 422 U.S. at 502. Mere allegations are usually sufficient, but if the defendant controverts the allegations, the plaintiff must demonstrate facts supporting his allegations. *Public Citizen* v. *Lockheed Aircraft Corp.*, *supra*, 565 F.2d at 714 n.20; *Sierra Club v. Morton*, 514 F.2d 856, 870 n.20 (D.C. Cir. 1975), *rev'd on other grounds sub nom. Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976). If, after the court provides the plaintiff an opportunity to support its allegations, "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth* v. *Seldin*, *supra*, 422 U.S. at 501-02.

The question of injury in fact in this case is controlled by the test established by the Supreme Court in *Warth* v. *Seldin*, *supra*, and *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976); and by the Court of Appeals for this Circuit in *Public Citizen*, *supra*. In essence, this test requires that the plaintiff demonstrate a substantial probability that the requested relief will benefit him in some perceptible and tangible fashion. *See Simon*, *supra*, 426 U.S. at 38; *Public Citizen*, *supra*, 565 F.2d at 715. The possibility of relief may not be speculative, *Simon*, 426 U.S. at 44 "remote," *Warth*, 422 U.S. at 507, or "conjectural or hypothetical," *California Bankers Association* v. *Schultz*, 416 U.S. 21, 69 (1974); *Public Citizen*, 565 F.2d at 715.

Individual plaintiffs Harrell, Desmarais, and Weinberg allege that they are cost-conscious consumers of fluid dairy products who "routinely seek to de-

crease food expenditures without sacrificing taste or the nutritional value of their diet." Complaint, ¶ 7. They further allege that the existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk instead of raw fluid milk. *Id.* Plaintiff Community Nutrition Institute is a non-profit charitable organization specializing in food and nutrition issues. It seeks to further the needs of low income consumers.

The complaint alleges that "[i]n some areas of the United States, the cost of manufacturing reconstituted milk *may* be substantially less than the cost of fresh fluid milk." Complaint, ¶ 23. Similarly, "[a] reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply." *Id.* ¶ 31 (emphasis added). Other allegations are merely conclusory: "The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs . . . and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk." *Id.* ¶ 28; and "Elimination of the regulations *could* result in substantial savings to consumers." *Id.* ¶ 38 (emphasis added). Clearly, the statements in the complaint are not enough to establish injury in fact.

The plaintiffs, however, do provide affidavits and other information in support of their allegations. The affidavit of plaintiff Oberweis states: "Absent the compensatory payment, I could manufacture reconstituted milk for less than the price I pay for Class I milk." Affidavit of Joseph J. Oberweis, ¶ 6. The affidavits of Thomas B. Smith demonstrate that the orders do significantly raise the cost of producing reconstituted milk products and make it uneconomic

for handlers to do so under present conditions. *See* Supplemental Affidavit of Thomas B. Smith, ¶ 9. Yet these statements do not demonstrate that a change of this situation would probably benefit consumers. Indeed, the most persuasive statement on this point in the Smith affidavit is a quotation from the Justice Department's comments to the CNI petition: "If local handlers could economically turn to reconstituted milk they would substantially undermine the potential market power of local producers and limit their ability to extract premium prices." *Id.* ¶ 14. This is the only statement that goes even indirectly to the possible benefit to consumers from a change in the Orders.

The plaintiffs also rely heavily on the letter sent to them by the USDA, denying their petition to amend the Orders. Exhibit A to Plaintiffs' Cross-Motion for Summary Judgment. The letter does state that plaintiffs' proposed changes in the Orders would "reduce consumer expenditures by $186 million" and does admit that the availability of a reconstituted milk product "could be expected to make major inroads on the current sales of fresh milk from the southern and eastern districts."

This letter, however, goes on to say that the change in the Orders would cost producers an estimated $576 million dollars and would produce "a radical change in the Dairy industry." This change, according to the letter, might interfere with the public's access to an adequate supply of milk and might result in higher prices for milk products, including milk powder. Thus, the USDA letter does not, when viewed as a whole, demonstrate a substantial probability that the consumer plaintiffs in this case, or, for that matter any consumers, would benefit from a change in the Milk Market Orders.

There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative. Thus, the plaintiffs cannot demonstrate injury in fact and do not have standing.

2. *The Zone of Interests Test.*

The problem of whether consumers are within the zone of interests arguably protected by the cited portions of the AMAA involves a complex matter of statutory construction. The statutory provisions for Orders regulating commodities are in 7 U.S.C. § 608c, which nowhere mentions the interests of consumers. The plaintiffs, however, point to an earlier section of the AMAA which provides that the Secretary will exercise his power "as will provide, in the interests of producers and consumers, an orderly flow of the supply [of the commodity] to market. . . ." 7 U.S.C. § 602(4) (1976). The plaintiffs urge the Court to read this section in connection with § 608c(3) and (4), which provide that Orders are to be issued only if the Secretary finds that "the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter."

The question of what sections of a statute the Court should examine in determining what interests are arguably being protected by a statute was resolved in this Circuit in *Tax Analysts and Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The Court held that the broad general policy section of a statute may be read in conjunction with those sections that are relevant in determining the zone of interest in a particular case if the two parts of the statute share "an identity of purpose." *Id.* at 141; *U.S. League of Savings Associations* v. *Board of Governors of Federal Reserve System*, 463 F. Supp. 342, 349 (D.D.C. 1978); *cf. Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1188-89 (D.C. Cir. 1972).

Section 608c was enacted in substantially its current form as part of the Agricultural Adjustment Act Amendments of 1935, 49 Stat. 753 (1935). Section 602(4), on the other hand, was added to the AMAA as a part of the Agricultural Act of 1954, c. 1041, Title IV, § 401(a), 68 Stat. 906 (1954). The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. The House Report on the Act made it clear that the interests of consumers were being taken into account in dealing with these issues. This concern was expressed in terms of the importance of price stability, *id.* at 3407, and abundance of supply. *Id.* at 3402. The Report also makes it clear that farm prices are in large measure independent of the prices consumers pay. *Id.* at 3404.

Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a significant part of the 1954 Act. The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. *See* House Report, *supra*, at 3404.

The 1935 Act was drafted in response to a substantially different situation. As part of Congress' attempt to speed recovery from the Depression, the amendments sought to "secure fair exchange value for farm products" as their primary objective and also "[b]y restoring and sustaining farm buying power . . . [to] contribute effectively to the general recovery of business." S. Rep. No. 1011, 74th Cong., 1st Sess. 1 (May 13, 1935). The Senate Report also makes explicit the exact purpose of the Orders regulating commodities: "to raise producer prices." *Id.* at 3.

There is only one mention of consumers in the Report, and that is an explanation of the meaning of section 602(2), which was amended by the bill to read: "To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1). . . ." Although the plaintiffs also rely on this section of the statute to support their standing in this case, the Report states that the amendment was enacted to "protect consumers against unwarrantably rapid or excessive prices *increases*" and to ensure that the Secretary of Agriculture had no authority to set prices above the parity level. *Id.* at 5 (emphasis added). Neither the ques-

tion of price increases nor the issue of parity pricing is implicated in this case.

The foregoing review makes several things clear. First, the mention of consumers in 602(4) does not serve the same purpose as the provision for Market Orders in section 608c does, for the two sections were enacted at different times, in response to different problems, and as a part of very different remedies to farm problems. Thus, § 602(4) should not be read in conjunction with § 608c in determining the zone of interests protected by the latter section. Second, the provisions of § 602(2), which were enacted simultaneously with § 608c and which mention the interests of consumers, were enacted with a very specific purpose in mind—to prevent price increases and prices above the parity level. These issues are not relevant to this case; and even if the statute were construed to give consumers standing in some instances, it would not confer standing on these consumers.

This analysis is consonant with the view of the Ninth and Fifth Circuits. In *Rasmussen* v. *Hardin*, the Ninth Circuit stated that Congress did not intend that persons who are affected by an order "only if they choose to buy [a product] and then only in that they must pay a higher price for it, should have standing to seek judicial review." 461 F.2d 595, 599 (9th Cir.), *cert. denied*, 409 U.S. 933 (1972). Although *Rasmussen* was ostensibly decided on the issue of whether the statute precluded consumers from seeking review, the decision also seems to go to the question of the zone of interests protected. Similarly, the Fifth Circuit, in holding that producers have standing under the AMAA to seek judicial review, noted that "[w]e find the generalized interests of consumers in a marketing order totally differ-

ent from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers." *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979). Both of these cases point out that it would make little sense for Congress to provide administrative review for producers and handlers, the two classes most affected by orders, but to allow consumers to go directly to court without having to exhaust any administrative process. If consumers are beyond the zone of protected interests, so too is a group such as CNI which is dedicated to furthering the nutritional interests of consumers.[5]

3. *The Preclusion of Review.*

In *Rasmussen* v. *Hardin*, *supra*, the Ninth Circuit denied consumers standing to challenge Milk Market Orders on the ground that Congress, by providing handlers a special means of challenging the Orders, intended that means of review to be exclusive. 461 F.2d at 599. Other courts have allowed producers standing to challenge Orders. *See Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1067; *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009, 1011 (D.C. Cir. 1971).

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[5] Plaintiff CNI relies heavily on *Community Nutrition Institute* v. *Bergland*, C.A. 80-0243, Mem. (D.D.C. June 21, 1980), to establish their standing in this case. While that case found a zone of interests that covered "interests regulated as well as protected by the statute in question," *id.* at 5, the statute in the present case, section 608c, cannot be read to protect consumers. Moreover, consumer plaintiffs cannot demonstrate injury in fact in this case. Thus, a group representing the interests of consumers does not have standing to maintain this suit.

Yet, as the court in *Suntex Dairy* made clear, producers have "a definite and direct economic stake in a milk market order." 591 F.2d at 1067 n.3. Moreover, Congress provided producers with administrative review in the form of ratification referenda. *Id.* at 1066. No such review has been provided for consumers to challenge the Orders. Therefore, it is not illogical to infer, as did the court in *Rasmussen*, that Congress intended to preclude consumers from seeking review.

B. *Plaintiff Oberweis.*

Plaintiff Oberweis is a handler as that term is defined by the AMAA. 7 U.S.C. § 608c(1). The statute provides a specific means by which a handler can seek relief from a Market Order. *Id.* § 608c (15)(A). A handler must file a petition with the Secretary of Agriculture and follow the procedures set out in 7 C.F.R. §§ 900.50-900.71 (1981). Plaintiff Oberweis, by his own admission, has not followed this procedure. He claims, however, that he is excused from following the procedure because his petition for rulemaking contained substantially the same information as a handler petition. Consequently, he argues it would be futile for him to pursue further administrative remedies.

The Supreme Court has recognized the importance of these particular administrative remedies: "Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling, and the elucidation which he would presumably give to his ruling, that resort may be had to the courts." *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). The purpose of Congress in imposing this particular form

of procedure is also clear: "It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." Senate Rep. No. 1011, *supra*, at 14. To allow a handler to circumvent the review provisions would thwart this purpose, perhaps in some cases with the result of hampering enforcement.

The exhaustion requirement under section 608c has been recognized in this circuit. *See American Dairy of Evansville, Inc.* v. *Bergland*, 627 F.2d 1252 (D.C. Cir. 1980). Although the Court loosely applied the requirement, it would seem that the Court would not allow the terms of the statute to be ignored as they have been by the plaintiffs in this case. Therefore, plaintiff Oberweis must be dismissed for failure to exhaust his administrative remedies.*

III. *Conclusion.*

The consumer plaintiffs do not have standing to maintain this suit, and plaintiff Oberweis has not exhausted his administrative remedies. Therefore, this case must be dismissed for lack of subject matter jurisdiction.

/s/ Oliver Gasch
Judge

Date: Sept. 29, 1981

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* Even if plaintiff Oberweis has substantially complied with the provisions of 7 U.S.C. § 608c(15)(B), venue does not lie in this Court but in the district court in Illinois.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL.,
PLAINTIFFS

v.

JOHN R. BLOCK, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' and intervenor-defendants' motions to dismiss or, in the alternative, for summary judgment, and upon consideration of the memoranda and exhibits in support thereof and opposition thereto, the arguments of counsel in open Court, and the entire record herein, and for the reasons stated in the accompanying memorandum of even date, it is by the Court this 29th day of September, 1981,

ORDERED that defendants' motion to dismiss be, and hereby is, granted and plaintiffs' complaint is hereby dismissed with prejudice.

/s/ Oliver Gasch
Judge

APPENDIX H

STATUTORY PROVISIONS

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are as follows:

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agri-

culture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c (6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public in-

terest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

* * * * *

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York,

Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not

the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with re-

spect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be

limited to one year, and (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative

marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the

authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in

the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and condi-

tions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler

may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, avocados, apples, raisins, walnuts, or tomatoes, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including

paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become

effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area

producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different

terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order; penalty

Any handler subject to an order issued under this section, or any officer, director, agent, or employee

of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with

jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end

of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing,

shall be deemed due notice thereof: *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic condi-

tions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer or processor referendum for approving order

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case

may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66⅔ per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

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